

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)

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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the *Federal Register*.

The principal statutes concerned are the Agriculture Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agriculture Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published are numbered serially, in the order in which they appear herein, as "Agricultural Decisions." They may be cited by giving the volume and page, for illustrations, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in *Agriculture Decisions*.

Current court decisions involving the regulatory laws administered by the Department of Agriculture are published herein.

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*ZELDENRUST, PETE and HANK VANDER WALL v. THE OOST PRODUCE COMPANY, INC. PACA Docket No. RD-83-387. Default Order	1700

POULTRY PRODUCTS INSPECTION ACT

*ELBERTON POULTRY COMPANY, INC. PPIA Docket No. 9. Stipulation and Consent Decision	1718
MILAN'S ENTERPRISES, INC. d/b/a MILAN'S SMOKED MEATS. PPIA Docket No. 5 Consent	17
FRUSCIONE'S, INC. PPIA Docket No. 6, FMIA Docket No. 64. Stipulation and Consent Decision	1057

*Reported in this issue.

(No. 22,871)

In re: LYKES BROS., INC. I&G Docket No. 76. Decided October 19, 1983.

Withdrawal of meat grading services—Consent.

Marshall Marcus, for complainant.

Michele F. Crown, Tampa, Florida, for respondent

Decision by John A. Campbell, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

This proceeding was instituted under the Agriculture Marketing Act of 1946 as amended (7 U.S.C. 1621 *et seq.*) ("Act"), and the regulations promulgated thereunder, 7 C.F.R. Subpart H and Part 54 ("regulations"), by a complaint filed on May 2, 1983 by the Administrator, Agriculture Marketing Services, United States Department of Agriculture, the agency responsible for the administration of federal meat grading and acceptance services. The complaint alleges that respondent violated the Act and regulations. Respondent filed its Answer to this Complaint on May 25, 1983, denying that respondent violated any of the Acts or regulations, setting forth its defenses and requesting a hearing on the matter. This stipulation and consent decision is entered pursuant to the consent provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. 1.138).

Respondent admits the jurisdictional allegations of the Complaint and specifically admits that the Secretary has jurisdiction in this matter. It neither admits nor denies the remaining allegations of the Complaint, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this Stipulation and Consent Decision.

FINDINGS OF FACT

1. Lykes Bros., Inc., is, and at all times material herein was, a corporation which operates a meat processing establishment at P.O. Box 518, Turkey Creek Road, Plant City, Florida 33566.

2. At all times material herein, respondent has requested and received federal meat grading and acceptance services at its place of business in Plant City, Florida.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision in disposition of this proceeding, such Decision will be issued.

ORDER

I. Pursuant to agreement of the parties, the benefits of federal meat grading and acceptance services provided to respondent under the Act are, for a period of six (6) months, voluntarily withdrawn by and denied to respondent, its officers, directors, successors, and assigns, directly or through any corporate or other device. This withdrawal and denial will be effective for a period of thirty (30) days from December 15, 1983 to January 13, 1984. The remainder of the six (6) month period will be held in abeyance and will not become effective:

(a) For so long as, within six (6) months of the effective date of this Order, respondent or any of its officers, agents, employees, successors or assigns do not violate (as that terms is defined in paragraph II infra) any section of the Act or regulations promulgated thereunder.

II. The term violates, as used in paragraph I(a) herein, means a violation found upon conviction (or upon affirmation of conviction, if appealed), or upon a final decision in a formal adjudicatory proceeding before the Secretary (or upon affirmation of the Secretary's decision, if appealed), and if it is found that there is any such violation of any term of the Order, the suspension of the withdrawal and denial of grading and acceptance services under the Act shall be terminated and denial will become effective immediately. This shall not preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

III. The respondent waives any action against the United States Department of Agriculture, under the Equal Access to Justice Act of 1980, Pub. L. 96-481, which went into effect October 1, 1981, for fees and other expenses incurred by respondent in connection with this proceeding.

(No. 22,872)

In re: LORRAINE MCBRYDE, d/b/a CIRCLE R. KENNELS. AWA Docket No. 228. Decided September 27, 1983.

Dealer—Operating without a license—Civil penalty.

Respondent was ordered to cease and desist from operating as a dealer without being licensed as a dealer and violating the Act and regulations and standards issued thereunder. Respondent was assessed a civil penalty of \$500.

Robert A. Ertman, for complaint.

Respondent, *pro se*

Victor W. Palmer, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§2131-2155), in which Administrative Law Judge Victor W. Palmer filed an initial default decision and order on August 9, 1983, ordering respondent to cease and desist from (i) operating as a dealer without being licensed as a dealer, and (ii) violating the Act, regulations and standards under the Act. He also assessed a civil penalty of \$500.

On September 20, 1983, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§5556 and 557 (7 C.F.R. §2.35).¹

Respondent's appeal presents no basis for setting aside Judge Palmer's default decision and order, and, therefore, the initial decision is adopted as the final decision. The final order is identical to Judge Palmer's order, except that the effective date has been changed in view of the appeal.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a proceeding under the Animal Welfare Act, as amended (7 U.S.C. §2131 *et seq.*), hereinafter referred to as the "Act," and the

¹The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1963), reprinted in 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years trial litigation; 10 years appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

regulations issued thereunder. (9 C.F.R. §1.1 *et seq.*). A complaint is issued by the Administrator of the Animal and Plant Health Inspection Service hereinafter referred to as "APHIS," in accordance with the applicable Rules of Practice was duly served upon the respondent. (7 C.F.R. §§1.135, 1.147(b))

Respondent's failure to file an answer within the time specified in the complaint constitutes an admission of the facts alleged in the complaint and a waiver of hearing. (7 C.F.R. §§1.136(a), 1.139) Therefore, this decision and order is entered according to the Rules of Practice. (7 C.F.R. §1.139)

FINDINGS OF FACT

1. Lorraine McBryde, hereinafter referred to as respondent, is an individual whose address is Route 1, Box 238, Woodville, Texas 75979.

2. On October 6, 1981, a decision was issued by Administrative Law Judge John G. Liebert (AWA Docket No. 151). Respondent consented to an order that she cease and desist from, among other things, operating as a dealer, without being licensed as a dealer.

3. On April 10, 1981, respondent was licensed under the Act as a Class A dealer.

4: On September 9, 1982, respondent's license was automatically terminated due to her failure to renew the license.

5. On September 27 and October 11, 1982, respondent, while not licensed under the Act, sold two and three dogs, respectively, to a licensed dealer for resale.

By reason of the findings of fact set forth herein, respondent has violated §4 of the Act (21 U.S.C. §2134), §2.1 of the regulations (9 C.F.R. §2.1), and the order issued on October 6, 1981.

These violations warrant the sanction authorized under the Act (7 U.S.C. §2149(a), (b)) and contained in the following order.

ORDER

Respondent, her agents and employees, directly or indirectly through any corporate or other device, in connection with her business as a dealer within the meaning of the Act, shall cease and desist from (1) operating as a dealer, without being licensed as a dealer, and (2) violating the Act and the regulations and standards under the Act.

Further, respondent is assessed a civil penalty of \$500 which shall be paid by certified check or money order to the order of the Treasurer of the United States which shall be forwarded to Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, Room

2014-S, Washington, D.C. 20250 within thirty days from the date this order becomes effective.

This decision and order shall become effective upon service on respondent.

(No. 22,873)

In re: DEANNE F. ATWOOD AWA Docket No. 254. Decided October 25, 1983.

Dealer—Compliance with the Act—Civil penalty—Consent.

Morris L. Selinger, for complainant.

Patrick Maney, Eash Greenbush, New York, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Animal Welfare Act as amended U.S.C. 2131 *et seq.*) by a complaint filed by the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent has violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (7 CFR 1.138).

The respondent, admits the jurisdictional allegations of the complaint, specifically admits that the Secretary has jurisdiction in this matter, and consents and agrees for the purpose of settling this proceeding to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent, Deanne F. Atwood, is an individual whose address is Old Route 20, Box 176A, East Nassau, N.Y. 12062.

2. At all times material herein respondent was either licensed under the Act as a Class A dealer, or operated as a "dealer" as that term is defined in section 2(f) of the Act (7 U.S.C. 2132(f)), without being licensed as a dealer.

CONCLUSION

The respondent having admitted the jurisdictional facts alleged in the complaint and the parties having agreed to the entry of this decision without further procedure, such decision will be entered.

Respondent, his agents and employees directly or indirectly through any corporate or other device in connection with his business under the Act shall comply with each and every provision of the Animal Welfare Act, as amended (7 U.S.C. 2131 *et seq.*) and the standards and regulations issued thereunder (9 CFR 1.1 *et seq.*) and shall cease and desist from any violation thereof.

In addition, respondent is assessed a civil penalty of \$1000, of which \$200 shall be paid by certified check or money order to the Treasurer of the United States and shall be forwarded to Morris L. Selinger, Office of the General Counsel, Room 2008, South Building, United States Department of Agriculture, Washington, D.C. 20250 within thirty days from the date this Order becomes effective. The additional \$800 is hereby suspended, upon the condition that it shall not at any subsequent time be determined in a proceeding before the Secretary of Agriculture that said respondent violated the Animal Welfare Act, as amended, during the period of two years from the effective date of this Order.

This order shall have the same force and effect as if entered pursuant to a full hearing and shall be final upon issuance and effective upon service of the decision upon respondent.

(No. 22,874)

In re: WEYANDT'S and SONS WHOLESALE MEATS FMIA Docket No. 67. Decided September 19, 1983.

Owner agrees to sell his interest in all real property and make a gift of all interest in personal property owned by respondent—New owners agree to form a new corporation with a specified board of directors—Consent.

Hughey P. "Bobby" Weyandt, III, was convicted in U.S. District Court of: conspiring to violate provisions of the Act; preparing, with intent to defraud, carcasses of cattle which were not inspected; representing that beef had been inspected when it had not been so inspected; and selling and transporting, in commerce, quartered carcasses of beef which had not been inspected and passed as required by the Act.

Therefore, Hughey P. "Bobby" Weyandt, III, owner of respondent, agreed to sell all interest in the real property owned and used by respondent as a slaughtering and meat packing establishment and to make a gift of all interest in the personal property owned by respondent to Robert B. and Brian R. Weyandt.

Robert B. and Brian R. Weyandt agreed to form a corporation operating under the name of Tri-County Packing, Inc. with a specified board of directors. Tri-County Packing, Inc. also agreed to terminate the employment of Charles Benny Weyandt within 90 days.

Hughey P. "Bobby" Weyandt agreed that there will be no business transactions of any kind whatsoever between himself and Tri-County Packing with one temporary exception. He also agreed that he will have no access whatsoever to the business premises of Tri-County Packing.

Tri-County Packing, Inc. agreed: that all slaughtering and processing of meat food products will be conducted under federal meat inspection and, specifically, there will be no custom slaughtering or processing; to allow USDA personnel complete access to the business facilities and records; that it will not violate any section of the Act; and that it will not knowingly employ anyone who has been convicted of any felony or misdemeanor based upon acquiring, handling or distributing of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food.

Gary Kahn and Harold J. Reuben, for complainant.

Paul S. Foreman, Altoona, Pennsylvania, for respondent.

Decision by William J. Weber, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Federal Meat Inspection Act (FMIA), as amended (21 U.S.C. §601 *et seq.*), and the applicable Rules of Practice (9 CFR §335.1 *et seq.*), to withdraw federal meat inspection services from Weyandt's and Sons Wholesale Meats (respondent). This proceeding was commenced by a complaint filed on March 11, 1983, by the Administrator of the Food Safety and Inspection Service (FSIS), United States Department of Agriculture (USDA), who is responsible for the

administration of federal meat inspection services. The parties have agreed that this proceeding should be terminated by the entry of the consent decision set forth below and have agreed to the following stipulations:

1. For purposes of this stipulation and the provisions of this consent decision only, respondent admits all of the jurisdictional allegations of the complaint and waives:
 - (a) Any further procedural steps;
 - (b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact or law, as well as the reasons or bases thereof; and
 - (c) All right to seek judicial review or otherwise to challenge or contest the validity of this decision.
2. This stipulation and consent decision are for purposes of settlement in this proceeding only and do not otherwise constitute an admission or denial by the respondent that it has violated the regulations or statutes involved.
3. The respondent stipulates that the USDA is the "prevailing party" in this proceeding and waives any action against the USDA under the Equal Access to Justice Act of 1980, Pub.L. 96-481, for fees and other expenses incurred in connection with this proceeding.

FINDINGS OF FACT

1. Respondent is a firm operating a slaughtering and meat packing establishment in Claysburg, Pennsylvania.
2. Respondent is now, and at all times material herein was, the recipient of inspection services under Title I of the FMIA.
3. Hughey P. "Bobby" Weyandt, III, is now, and at all times material herein was, responsibly connected with the respondent, as owner and operator.
4. On March 4, 1983, Hughey P. "Bobby" Weyandt, III, was convicted, in the United States District Court for the Western District of Pennsylvania, of one felony for knowingly and unlawfully conspiring to violate the provisions of the FMIA.
5. On March 4, 1983, Hughey P. "Bobby" Weyandt, III, was convicted, in the United States District Court for the Western District of Pennsylvania, of one felony for preparing, with intent to defraud, the carcasses of approximately five cattle, which were capable of use as human food and which were not inspected and passed as required by the FMIA.
6. On March 4, 1983, Hughey P. "Bobby" Weyandt, III, was convicted, in the United States District Court for the Western District of

Pennsylvania, of one felony for representing, with intent to defraud, that beef from five cattle had been inspected and passed when the beef had not been so inspected and passed.

7. On March 4, 1983, Hughey P. "Bobby" Weyandt, III, was convicted, in the United States District Court for the Western District of Pennsylvania, of one misdemeanor for selling and transporting, in commerce, approximately 30 quartered carcasses of beef which had not been inspected and passed as required by the FMIA.

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following consent decision in disposition of this proceeding, such decision will be issued.

ORDER

I

1. Hughey P. "Bobby" Weyandt, III, owner of respondent, agrees to convey all interest in the real property owned and used by respondent as a slaughtering and meat packing establishment in Claysburg, Pennsylvania, to Robert B. Weyandt and Brian R. Weyandt for a price of \$150,000. The deed of conveyance is incorporated by reference in and made a part of this Stipulation and Consent Decision.

2. Hughey P. "Bobby" Weyandt, III, agrees to make a gift of all interest in the personal property owned by respondent to Robert B. Weyandt and Brian R. Weyandt,*

3. Robert B. Weyandt and Brian R. Weyandt agree to form a corporation operating under the name of Tri-County Packing, Inc. Said corporation will have a Board of Directors elected for a five year period comprised of the following individuals:

- a) Jack Lee Miller
Duncansville, Pennsylvania
- b) Robert B. Ziegler
Claysburg, Pennsylvania
- c) Bernie J. Miller
Queen, Pennsylvania
- d) Robert B. Weyandt
Claysburg, Pennsylvania

*With the exception of inventory which will be sold to the corporation for cash at its fair market value on or before October 1, 1983.

e) Brian R. Weyandt
Claysburg, Pennsylvania

Each Director named in subparagraphs a, b, and c above agree to invest \$5,000 in Tri-County Packing, Inc. In return for their investment, they will each receive one share of common voting stock and a certificate of indebtedness in the amount of \$5,000 to be repaid within five years. If any Director named in subparagraphs a, b, or c above resigns or is removed from office, the replacement must be selected with the approval of the Director, Compliance Division, Food Safety and Inspection Service, Washington, D.C.

4. Tri-County Packing, Inc. agrees that on or before 90 days from the date this consent decision is issued, it will terminate the employment of Charles Benny Weyandt.

5. Hughey P. "Bobby" Weyandt, III, and Tri-County Packing, Inc. agree that there will be no business transactions of any kind whatsoever between each other after the effective date of this agreement, except that Hughey P. "Bobby" Weyandt, III, prior to December 31, 1983, may act as an independent contractor, and service and repair vehicles owned by Tri-County Packing, Inc. at his automobile garage in Claysburg, Pennsylvania.

6. Hughey P. "Bobby" Weyandt, III, agrees that he will have no access whatsoever to the business premises of Tri-County Packing, Inc. If it becomes necessary, as a result of his holding a mortgage on the real property of Tri-County Packing, Inc. for him to have access to the business premises, an agent will be appointed with the approval of the Director, Compliance Division, Food Safety and Inspection Service, Washington, D.C.

7. Tri-County Packing, Inc. agrees that all slaughtering and processing of meat food products will be conducted under federal meat inspection. Specifically, there will be no custom slaughtering or processing as permitted under section 23 of the FMIA (21 U.S.C. §623).

8. Tri-County Packing, Inc. agrees to allow FSIS inspectors, compliance officers, and other USDA personnel complete access to the business facilities and to all business records. Business records include those documents pertaining to the transaction referred to in subparagraphs , 2 and 3 of this paragraph.

9. Tri-County Packing, Inc. agrees that it or any of its officers, partners, employees, agents or affiliates will not violate any section of the FMIA or state or local statute, involving the preparation, sale, transportation or attempted distribution of any adulterated or misbranded products.

10. Tri-County Packing, Inc. agrees that it will not knowingly employ any individual who has been convicted, in any federal or state court of any felony or misdemeanor based upon the acquiring, handling or dis-

tributing of unwholesome, mislabeled or deceptively packaged food, or fraud in connection with transactions in food. Tri-County Packing, Inc. agrees that it will immediately terminate the employment of any such individual when that individual's conviction becomes known.

II

The violation of any provision in paragraph I of this order will result in the immediate withdrawal of inspection services under Title I of the FMIA. The term "violation" means a final decision in a formal adjudicatory proceeding before the Secretary of Agriculture or a conviction in federal or state court. This shall not preclude the referral of any such violation to the Department of Justice for possible criminal or civil proceedings.

III

If any provision of this order is declared to be invalid, such declaration shall not affect the validity of any other provision herein.

IV

This order will become effective when issued.

(No. 22,875)

In re: WEYANDTS and SONS WHOLESALE MEATS, FMIA Docket No. 67. Filed October 27, 1983.

*Gary Kahn and Harold J. Reuben, for complainant.
Paul S. Foreman, Altoona, Pennsylvania, for respondent.*

Issued by William J. Weber, Administrative Law Judge.

AMENDMENT TO STIPULATION AND CONSENT DECISION

(1)

A Stipulation and Consent Decision was entered in the above-captioned matter by the Administrative Law Judge on September 15, 1983.

(2)

The parties to said Stipulation and Consent Decision do hereby agree to the amendment of the last paragraph of paragraph I.3. of the Order to read as follows:

"Each director named in subparagraph (a), (b), and (c) above agree to invest \$5,000.00 in Tri-County Packing, Inc. In return for their investment, they will each receive 1000 shares of common voting stock for which they will pay the sum of \$1000.00 and will receive a Judgment Note in the amount of \$4,000.00 to be repaid within five years at an interest rate at twelve (12%) percent per annum. If any director named in subparagraphs (a), (b), or (c) above resigns or is removed from office, the replacement must be selected with the approval of the Director Compliance Division, Food Safety and Inspection Service, Washington, D.C.

(3)

In all other respects, the Stipulation and Consent Decision issued September 15, 1983, is confirmed in its entirety.

Cite as 42 A.D. 1385

(No. 22,876)

In re: DICK PEEBLES, SARAH JO GREEN, and WALTER GREEN. HPA Docket No. 121. Decided September 8, 1983.

Civil penalty—Consent.

Robert A. Ertman, for complainant.
Respondent, *pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO RESPONDENTS SARAH JO GREEN AND WALTER GREEN

This is an administrative proceeding under the Horse Protection Act as amended (15 U.S.C. 1821 *et seq.*), instituted by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, charging that respondents have violated the Horse Protection Act, as amended. This consent decision is entered under authority of the applicable Rules of Practice (7 CFR 1.138).

Respondents Sarah Jo Green and Walter Green admit the jurisdictional allegations of the complaint, specifically admit the jurisdiction of the Secretary of Agriculture, neither admit nor deny the remaining allegations of the complaint, and waive oral hearing and further procedure. Respondents Sarah Jo Green and Walter Green and complainant consent to the issuance of the following order:

ORDER

Respondents Sarah Jo Green and Walter Green are jointly assessed a civil penalty of \$500, which shall be payable by a certified check or money order to the Treasurer of the United States and forwarded to Robert A. Ertman, Office of the General Counsel, Room 2014, South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the date this order becomes effective. This order shall be effective upon service on respondents Sarah Jo Green and Walter Green.

(No. 22,877)

In re: DICK PEEBLES, SARAH JO GREEN, and WALTER GREEN. HPA Docket No. 121. Filed September 8, 1983.

Dismissal of complaint.

"Each director named in subparagraph (a), (b), and (c) above agree to invest \$5,000.00 in Tri-County Packing, Inc. In return for their investment, they will each receive 1000 shares of common voting stock for which they will pay the sum of \$1000.00 and will receive a Judgment Note in the amount of \$4,000.00 to be repaid within five years at an interest rate at twelve (12%) percent per annum. If any director named in subparagraphs (a), (b), or (c) above resigns or is removed from office, the replacement must be selected with the approval of the Director Compliance Division, Food Safety and Inspection Service, Washington, D.C.

(3)

In all other respects, the Stipulation and Consent Decision issued September 15, 1983, is confirmed in its entirety.

(No. 22,876)

In re: DICK PEEBLES, SARAH JO GREEN, and WALTER GREEN. HPA Docket No. 121. Decided September 8, 1983.

Civil penalty—Consent.

*Robert A. Ertman, for complainant.
Respondent, pro se.*

Decision by Victor W. Palmer, Administrative Law Judge.

CONSENT DECISION WITH RESPECT TO RESPONDENTS SARAH JO GREEN AND WALTER GREEN

This is an administrative proceeding under the Horse Protection Act as amended (15 U.S.C. 1821 *et seq.*), instituted by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, charging that respondents have violated the Horse Protection Act, as amended. This consent decision is entered under authority of the applicable Rules of Practice (7 CFR 1.138).

Respondents Sarah Jo Green and Walter Green admit the jurisdictional allegations of the complaint, specifically admit the jurisdiction of the Secretary of Agriculture, neither admit nor deny the remaining allegations of the complaint, and waive oral hearing and further procedure. Respondents Sarah Jo Green and Walter Green and complainant consent to the issuance of the following order:

ORDER

Respondents Sarah Jo Green and Walter Green are jointly assessed a civil penalty of \$500, which shall be payable by a certified check or money order to the Treasurer of the United States and forwarded to Robert A. Ertman, Office of the General Counsel, Room 2014, South Building, United States Department of Agriculture, Washington, D.C. 20250, within thirty (30) days from the date this order becomes effective. This order shall be effective upon service on respondents Sarah Jo Green and Walter Green.

(No. 22,877)

In re: DICK PEEBLES, SARAH JO GREEN, and WALTER GREEN. HPA Docket No. 121. Filed September 8, 1983.

Dismissal of complaint.

Robert A. Ertman, for complainant.

Respondent, *pro se*

Order issued by Victor W. Palmer, Administrative Law Judge.

DISMISSAL OF COMPLAINT AGAINST DICK PEEBLES

Upon consideration of complainant's motion that the complaint against respondent Dick Peebles be dismissed for the reason that further proceedings would not further the purposes of the Horse Protection Act, the motion is herewith granted, and the complaint against Dick Peebles is dismissed.

(No. 22,878)

In re: RICHARD L. THORNTON and BILL CANTRELL. HPA Docket No. 125. Filed October 17, 1983.

Civil penalty—Disqualification.

Respondents were each assessed a civil penalty of \$2,000. Respondents were disqualified from showing or exhibiting any horse and from judging or managing any horse show, exhibition or auction for a period of one year.

Morris Selinger, for complainant.

David B. Byrne, Jr. and John M. Bolton, III, Montgomery, Alabama, for respondents.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER

Upon consideration of the opinion entered by the Eleventh Circuit Court of Appeals on September 26, 1983, Slip Opinion No. 82-7187 and the representation of counsel that respondents do not intend to appeal this matter further,

It is, Ordered, Adjudged and Decreed as follows:

It is hereby Ordered that the respondents Richard L. Thornton and Bill Cantrell be each assessed a civil penalty of Two Thousand Dollars (\$2,000.00).

Further, respondents Richard L. Thornton and Bill Cantrell are each disqualified from showing or exhibiting any horse, and from judging or managing any horse show, exhibition or auction, for a period of one year from September 26, 1983.

Certified checks or money orders payable to the Treasurer of the United States in payment of the civil penalty shall be forwarded to Baron B. Kahn, Office of the General Counsel, United States Depart-

ment of Agriculture, South Building, Washington, D.C. 20250 within sixty (60) days from the date of this order.

This order shall become final as to each respondent upon execution by the Judicial Officer.

DISCIPLINARY DECISIONS

(No. 22,879)

In re: DALE E. PETERSEN. P&S Docket No. 6136. Decided September 1, 1988.

Market agency—Dealer—Custodial account—Failing to pay when due—Accounts and records—Suspended as registrant—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Dale E. Petersen, hereinafter referred to as the respondent, is an individual who at all times material herein was doing business as Blackwell Livestock Auction. His principal place of business was located in Blackwell, Oklahoma. Respondent's present mailing address is P.O. box 164, Garden Plains, Kansas 67050.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of conducting and operating the Blackwell Livestock Auction stockyard, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of buying and selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for his own account; and

(c) Registered with the Secretary of Agriculture as a market agency and dealer to buy and sell livestock in commerce.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his business subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in his "Custodial Account for Shippers Proceeds," within the times prescribed in section 201.42 of the regulations (9 CFR 201.42), amounts equal to the proceeds due consignors for livestock purchased by respondent for market support, and amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;
2. Failing to otherwise maintain his "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 CFR 201.42);
3. Failing to remit to the owners or consignors of livestock, when due, the net proceeds derived from the sale of consigned livestock.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in his business subject to the Act including a general ledger of accounts showing assets, liabilities, income, expenses and net worth, a currently posted cash receipts and disbursements journal, accounts payable and accounts receivable ledgers, complete check registers, a market support account and complete livestock inventory records.

Respondent is suspended as a registrant under the Act for a period of 30 days and thereafter until he demonstrates that the deficit in his "Custodial Account for shippers' Proceeds" has been eliminated. When the respondent demonstrates that the deficit in his "Custodial Account for Shippers' Proceeds" has been eliminated, a supplemental order will be issued in the proceeding terminating this suspension after the expiration of the 30-day period.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,880)

In re: MIKE LARSEN d/b/a MIKE'S CATTLE Co. P&S Docket No. 6161.
Decided September 2, 1983.

Dealer—Failure to pay when due—Insufficient funds checks—Suspension of registration—Consent.

Allan R. Kahan, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent's financial condition does not meet the requirements of the Act and that the respondent willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR §1.138).

The respondent admits the jurisdictional allegations in paragraph I of the complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

FINDINGS OF FACT

1. Mike Larsen, doing business as Mike's Cattle Co., hereinafter referred to as the respondent, is an individual whose mailing address is Box 107A-1, Route #2, Buffalo, Missouri 65622.
2. Respondent was, at all times material herein:
 - (a) Engaged in the business of buying and selling livestock in commerce for his own account; and
 - (b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of the decision, such decision will be entered.

ORDER

Respondent Mike Larsen, individually or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and
2. Issuing checks in payment for livestock without having or maintaining sufficient funds to pay such checks on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented for payment.

Respondent is suspended as a registrant under the Act for a period of eight weeks and thereafter until he demonstrates that he is no longer insolvent. When respondent demonstrates that he is no longer insolvent, a supplemental order shall be issued in this proceeding terminating this suspension, after the expiration of the eight-week period.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served on the parties.

(No. 22,881)

In re: RODNEY BOLCAO. P&S Docket No. 6134. Decided September 14, 1983.

Dealer—Bonding requirement—Civil penalty—Consent.

Peter V. Tram, for complainant.

Respondent, pro se.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondent admits the jurisdictional allegations in paragraph I

of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Rodney Bolcao, hereinafter referred to as the respondent, is an individual whose mailing address is 5805 Cherub Lane, Winton, California 95388.
2. Respondent is, and at all times material herein was:
 - (a) Engaged in the business of a market agency buying livestock in commerce on a commission basis; and
 - (b) Registered with the Secretary of Agriculture as a dealer purchasing livestock for slaughter only as an employee of Rudnick Packing Co., Inc.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Rodney Bolcao, his agents, employees, successors and assigns, individually or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required under the Act and the regulations.

Insofar as respondent is now in compliance with the bonding provisions under the Act and the regulations, no suspension is warranted.

In accordance with section 312(b) of the Act (7 U.S.C. §213(b)), respondent is assessed a civil penalty in the amount of Two Hundred and Fifty Dollars (\$250.00).

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,882)

In re: BILLY C. ROBINSON, BENITA ROBINSON, JOE HAROLD MOTE, and CLEBURNE COUNTY LIVESTOCK SALES, INC. P&S Docket No. 6173. Decided September 14, 1983.

Dealer—Market agency—Liabilities exceed assets—Misusing proceeds from sale of livestock—Custodial account—Insufficient funds checks—Failure to pay when due—Suspension of registration—Consent.

Allan R. Kahan, for complainant.

Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION re: BILLY C. ROBINSON, BENITA ROBINSON, AND CLEBURNE COUNTY LIVESTOCK SALES, INC.

This proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*), by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

Respondents Billy C. Robinson, Benita Robinson and Cleburne County Livestock Sales, Inc., admit the jurisdictional allegations in paragraph I of the complaint as they pertain to them and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Billy C. Robinson, hereinafter referred to as respondent Billy Robinson, is an individual whose mailing address is P.O. Box 106, Route #1, Ranburne, Alabama 36273.
2. Respondent Billy Robinson, at all times material herein, was:
 - (a) Engaged in the business of buying and selling livestock in commerce for his own account;
 - (b) Engaged in the business of buying and selling livestock on a commission basis at the Gainesville Livestock Market stockyard, Gainesville, Georgia, and the Citizens Stockyard, Arlington, Georgia, both of

which are stockyards posted under and subject to the provisions of the Act, and engaged in the business of buying and selling livestock on a commission basis at the Gainesville stockyard, and selling livestock on a commission basis at the Citizens Stockyard; and

(c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy and sell livestock in commerce on a commission basis.

3. Respondent Billy Robinson is, and at all times material herein was, the President and major stockowner of respondent Cleburne County Livestock Sales, Inc., and with respondents Benita Robinson and Joe Harold Mote, responsible for the management, direction and control of respondent Cleburne County Livestock Sales.

4. Benita Robinson, hereinafter referred to as respondent Benita Robinson, is an individual whose business mailing address is P.O. Box 106, Ranburne, Alabama 36273.

5. Respondent Benita Robinson is, and at all times material herein was, Secretary-Treasurer of respondent Cleburne County Livestock Sales, Inc., and with respondents Billy Robinson and Joe Harold Mote, responsible for the management, direction and control of respondent Cleburne County Livestock Sales.

6. Cleburne County Livestock Sales, Inc., hereinafter referred to as respondent Cleburne, is a corporation whose mailing address is P.O. Box 106, Ranburne, Alabama 36273.

7. Respondent Cleburne, at all times material herein, was:

(a) Engaged in the business of conducting and operating the Cleburne County Livestock Sales stockyard, a stockyard posted under and subject to the provisions of the Act;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard, and buying and selling livestock for its own account in commerce; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.

8. Respondent Cleburne, at all times material herein, operated under the management, direction and control of respondents Billy Robinson, Benita Robinson and Mote.

CONCLUSION

Respondents Billy C. Robinson, Benita Robinson and Cleburne County Livestock Sales, Inc., having admitted the jurisdictional facts as they pertain to them, and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Billy C. Robinson, his agents and employees, directly or through any corporate or other device, in connection with his business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a market agency or dealer while his current liabilities exceed his current assets;
2. Using funds, or permitting the use of funds, received as proceeds from the sale of consigned livestock for purposes of his own or for any purpose other than the payment of the net proceeds to the owners, consignors or shippers of such livestock, for the payment of sums due the respondent as compensation for his services, or for the payment of lawful marketing charges;
3. Failing to deposit in his "Custodial Account for Shippers' Proceeds" within the times prescribed by section 201.42 of the regulations (9 C.F.R. §201.42) an amount equal to the proceeds receivable from the sale of consigned livestock;
4. Failing to otherwise maintain his "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. §201.42);
5. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and
6. Failing to transmit or deliver to the owners, consignors or shippers of livestock, when due, the net proceeds received from the sale of their livestock.

Respondent Billy C. Robinson is suspended as a registrant under the Act for a period of eighteen (18) months and thereafter until he demonstrates that he is no longer insolvent, and that the deficits in his custodial accounts, including the accounts for Gainesville and Cleburne, have been eliminated. When respondent Billy C. Robinson demonstrates that he is no longer insolvent, and that the deficits in his custodial accounts have been eliminated, a supplemental order will be issued in this proceeding terminating the suspension, after the expiration of the eighteen (18) month period. It is further ordered that this suspension of respondent Billy C. Robinson for a period of eighteen (18) months shall commence at the conclusion of the period of incarceration to which respondent Billy C. Robinson was sentenced in *State of Georgia v. Billy Robinson*, Case No. K-83-47489.

Respondent Cleburne County Livestock Sales, Inc., its officers, directors, agents and employees, directly or through any corporate or

other device, in connection with its business operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a market agency or dealer while its current liabilities exceed its current assets;
2. Using funds, or permitting the use of funds, received as proceeds from the sale of consigned livestock for purposes of its own or for any purpose other than the payment of the net proceeds to the owners, consignors or shippers of such livestock, for the payment of sums due the respondent as compensation for its services, or for the payment of lawful marketing charges;
3. Failing to deposit in its "Custodial Account for Shippers' Proceeds" within the times prescribed by section 201.42 of the regulations (9 C.F.R. §201.42) an amount equal to the proceeds receivable from the sale of consigned livestock;
4. Failing to otherwise maintain its "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. §201.42);
5. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and
6. Failing to transmit or deliver to the owners, consignors or shippers of livestock, when due, the net proceeds received from the sale of their livestock.

Respondent Cleburne County Livestock Sales, Inc., is suspended as a registrant under the Act for a period of eighteen (18) months and thereafter until it demonstrates that it is no longer insolvent, and that the deficit in its custodial account has been eliminated. When respondent Cleburne County Livestock Sales, Inc., demonstrates that it is no longer insolvent, and that the deficit in its custodial account has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension, after the expiration of the eighteen-month period.

Respondent Benita Robinson, her agents and employees, directly or through any corporate or other device, in connection with her operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in business as a market agency or dealer while her current liabilities exceed her current assets;
2. Using funds, or permitting the use of funds, received as proceeds from the sale of consigned livestock for purposes of her own or for any purpose other than the payment of the net proceeds to the owners, consignors or shippers of such livestock, for the payment of sums due the respondent as compensation for her services, or for the payment of lawful marketing charges;

3. Failing to deposit to her "Custodial Account for Shippers' Proceeds" within the times prescribed by section 201.42 of the regulations (9 C.F.R. §201.42) an amount equal to the proceeds receivable from the sale of consigned livestock;

4. Failing to otherwise maintain her "Custodial Account for Shippers' Proceeds" in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. §201.42);

5. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without having sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and

6. Failing to transmit or deliver to the owners, consignors or shippers of livestock, when due, the net proceeds received from the sale of her livestock.

Respondent Benita Robinson shall not engage in business as a market agency or dealer, within the meaning of those terms as defined in the Act, for a period of eighteen (18) months.

The provisions of this order shall become effective on the sixth day after service upon the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,883)

In re: LEON FARROW, KNOKE LIVESTOCK BUYERS, INC., and THOMAS LENZ. P&S Docket No. 5893. Decided September 21, 1983.

Dealer—Market agency—Arrangement where dealers do not compete—Significant injury to competition—Suspension of registration.

The Judicial Officer reversed the Administrative Law Judge's initial decision and order dismissing the complaint. The record establishes beyond any doubt that respondents entered into an arrangement under which they did not compete against each other for the purchase of "pound cows" during the time period involved. An administrative law judge's findings of fact are given great weight, but maybe reversed where documentary evidence or inferences to be drawn from the facts are involved. Complainant is required to prove its case only by a preponderance of the evidence.

The natural inference is drawn from the evidence that prices for pound cows at the Algona stockyard were adversely affected by the direct and significant injury to competition resulting from respondents' agreement. It is inferred that testimony of a witness not called by respondents would have been adverse to respondents. If an auction market regularly bought substantial volumes of a particular type of livestock, allegedly as market support, an investigation would be warranted to determine whether the market was illegally speculating in consignments. Although actual injury to producer prices in this case is based only on an inference, rather than direct evidence, actual injury to competition

is proven by undisputed evidence. Injury to competition, or even likely injury to competition, is all that is required to be shown.

Respondents' agreement and practice was in direct violation of Section 201.70 of the regulations promulgated under the Act. Respondents' practice pursuant to that agreement was an "unfair" practice prohibited by section 312(a) of the Act. The Packers and Stockyards Act is broader in scope than other regulatory statutes, and is remedial legislation to be construed liberally. It is well settled that where a practice injures or is likely to injure competition it is an unfair practice. It is further settled that the Act is designed to prevent potential injury by stopping unlawful practices in their incipiency.

Respondents' argument that their conduct was not unlawful because six isolated incidents cannot be an unfair practice, has no factual basis. The record shows that respondents engaged in a continuous non-competitive practice during the period involved. However even if the evidence established an unfair practice on only one occasion, the legislative history of the Act and case law supports the Department's position that a single violation may be an unfair practice under the Act.

Respondents argued that the complaint lacked specificity. However it is found that the complaint was sufficiently specific for an administrative proceeding.

Respondents' violations were intentional, flagrant and serious. A violation is willful if it is done intentionally or with careless disregard of statutory requirements. Respondents' conduct strikes at the core of fair competition, and is a flagrant and serious violation of the Act. Any sanction to be imposed must reflect the seriousness of the violations and be sufficient to insure future compliance by respondents and other potential violators.

Respondents were ordered to cease and desist from: engaging in any course of business for the purpose of controlling prices, entering into any arrangement with any other dealer under which anyone is to refrain from bidding on livestock; failing to conduct their livestock buying operations independently of and in competition with other dealers; and entering into any arrangement with any other dealer to "pool" their livestock purchases. Respondents Farrow and Knoke Livestock Buyers, Inc. were suspended as registrants under the Act for a period of 45 days.

Robert Swartzendruber, for complainant.

Robert Malloy, Goldfield, Iowa, for respondents.

Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*).¹ On

¹See generally Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, Agricultural Law, ch. 3 (1981 and Aug. 1988 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, Agricultural Law, ch. 71 (1980).

June 14, 1983, Administrative Law Judge Dorothea A. Baker filed an initial decision and order dismissing the complaint.

On July 22, 1983, complainant appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§556 and 557 (7 C.F.R. §2.85).² The case was referred to the Judicial Officer for decision on September 9, 1983.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. §1.145(d)), was requested by respondents, but is denied inasmuch as the issues of fact and law, which are not difficult, have been thoroughly briefed, and oral argument would seem to serve no useful purpose.

For the reasons set forth below, the record establishes beyond any doubt that respondents, who are independent livestock dealers, entered into an arrangement under which they did not compete against each other for the purchase of "pound cows" at the Algona Livestock Auction and Exchange, Algona, Iowa, during the period March 17 through June 30, 1980. Such a practice violates the Act and regulations.

FINDINGS OF FACT

1. Respondent Leon Farrow is an individual whose principal place of business is located at Ledyard, Iowa. His business mailing address is RFD Ledyard, Iowa 50556.
2. Respondent Farrow, at all times material herein, was engaged in the business of buying and selling livestock in commerce for his own account, and was registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.
3. Respondent Knoke Livestock Buyers, Inc., is a corporation with its principal place of business located at Knoke, Iowa. Its business mailing address is Knoke, Iowa 50558.
4. Respondent Thomas Lenz is the president, secretary, treasurer and principal stockholder of respondent Knoke Livestock Buyers, Inc., and manages and directs its day-to-day business.
5. Respondents Knoke and Lenz, at all times material herein, were engaged in the business of buying livestock in commerce on a commission basis and buying and selling livestock in commerce for their own account.

²The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program.)

Respondent Knoke, at all times material herein, was registered with the Secretary of Agriculture as a market agency to buy livestock on a commission basis and as a dealer to buy and sell livestock in commerce.

6. Algona Livestock Auction and Exchange, Algona, Iowa (Algona stockyard), was, at all times material herein, a posted stockyard subject to the provisions of the Packers and Stockyards Act, conducting a weekly livestock auction each Monday. All livestock are sold by the pound at the Algona stockyard, except for bred cows (Tr. 121).

7. Respondents Farrow and Lenz have been engaged in the business of buying or selling livestock as dealers for over 20 years. They attend regularly and buy livestock at many of the same auction markets, including the Algona stockyard. When respondent Lenz does not personally buy livestock at the Algona stockyard for his corporation, Knoke Livestock Buyers, Inc., he has another buyer, Larry Melco, present to buy for his corporation.

8. "Pound cows" are cattle bought by the pound for slaughter which are culled, non-productive, diseased, and/or old cows which a farmer wants to dispose of due to poor condition or lack of productivity. Such animals generally weigh from 700 to 1,500 pounds.

During the time period involved here, pound cows were sold at the Algona stockyard at prices generally ranging from \$34.25 per cwt. (CX 23, at 20) to \$58.25 per cwt. (CX 23, at 28), returning from \$300 to \$700 to the farmer. The prices for different pound cows sold at Algona on a single day frequently varied by as much as \$6 to \$10 per cwt. (CX 23). An unusually defective cow might sell, *e.g.*, for \$7.00 per cwt., returning about \$55 to the farmer (CX 23, at 18).

The number of pound cows offered for sale by an individual farmer is small, with an average individual consignment being one to five head at the Algona stockyard. Pound cows are generally sold one at a time at the Algona stockyard (Tr. 102). Pound cows are sold "as is" and at the buyer's risk. If the animal is condemned, the packer pays nothing for the animal (Tr. 100, 133).

9. Pound cows are a small percentage of the cattle sold at the Algona stockyard. Depending on the season of the year, between 15 and 45 pound cows are offered for sale out of a total of 400 to 800 head of cattle at Algona's weekly auction.

10. Respondents Knoke and Farrow both bought substantial quantities of pound cows at the Algona stockyard prior to their agreement referred to in Findings 15 and 16. Respondent Knoke, under the direction, management and control of respondent Lenz, and respondent Farrow were the principal buyers of pound cows at the Algona stockyard (Tr. 119, 179). The majority of buyers in attendance at the Algona stockyard were there to buy other types of livestock.

11. Respondents Knoke and Farrow both sold their pound cows (and some other livestock) to the same packer, Northern States Beef, Inc., Omaha, Nebraska. Respondents Knoke and Farrow separately contacted Northern States Beef, Inc., nearly every day, and sometimes several times a day, to get the prices Northern States was paying that day (Tr. 125-26). During 1980, respondent Knoke sold more livestock to Northern States Beef, Inc., than respondent Farrow, *i.e.*, respondent Knoke sold two to four loads of livestock, and respondent Farrow sold two to three loads of livestock, per week to Northern States (Tr. 125-26).

12. Northern States Beef, Inc., is located about 140 to 150 miles from the Algona stockyard. Trucking cost about \$1.80 per mile in the first half of 1980 (Tr. 131-32), or about \$270 from the Algona stockyard to Northern States Beef, Inc.

13. During the period involved in the complaint, March 17 through June 30, 1980, a buyer was present at the Algona stockyard for respondent Knoke for each of the Monday sales, and respondent Farrow was present for each of the sales except April 28 and May 5, 1980.

14. Two employees of the Packers and Stockyards Administration from the agency's Omaha Regional Office, Michael T. Purnell, a marketing specialist, and Merle Paulsen, an auditor, interviewed respondents Farrow and Lenz on July 31 and August 1, 1980, respectively. Mr. Purnell wrote short affidavits based on the interviews. After each respondent read the affidavit relating to his interview, he was sworn and signed the affidavit (Tr. 243-49).

15. The affidavit of respondent Lenz states in its entirety, except for brief "boiler plate" appearing on the first and third pages (CX 7):

My name is Tome Lenz and I am principal officer and manager of the corporation Knoke Livestock Buyers, Inc. of Knoke, Iowa, a livestock dealer firm registered and bonded with the Packers and Stockyards-AMS. In the rest of this statement this corporation will be abbreviated KLB.

As a dealer KLB buys pound cows at auction markets in Iowa for slaughter at Northern States Beef, Inc., Omaha, Nebraska.

Weekly, KLB, its agent or employee, attends the Algona Livestock Auction and Exchange to buy livestock. KLB does not buy pound cows for resale and slaughter at this Algona auction market when Leon Farrow of Ledyard, Iowa is in attendance at the sale.

We have an agreement that Leon Farrow buys and pays for the pound cows and we split the profit when they are sold to Northern States Beef, Inc.

When Leon Farrow does not attend this sale KLB purchases and pays for the pound cows.

KLB and Leon Farrow sit together at the sale and buy the

cows in a joint deal as we do not see ourselves as competitors as the cows we buy go to the same packer, Northern States Beef, Inc.

Respondent Lenz initialed two changes in the wording of his affidavit (CX 7, at 2).

16. Disregarding the "boiler plate" on page one of respondent Farrow's affidavit, the first two paragraphs state (CX 6):

I, Leon Farrow of Ledyard, Iowa am a livestock dealer registered and bonded with the Packers and Stockyards Administration.

On Mondays I buy livestock at the auction in Algona, Iowa. On Tuesdays I buy livestock at the auctions in Spencer and Buffalo Center, Iowa. On Wednesday I bought livestock at the auction in Forest City, Iowa. On Fridays I buy livestock at the auction market in Sioux Center, Iowa. On Saturdays I buy livestock out of the auction market in Sibley, Iowa. I buy and pay for pound cows at all of these markets and send them for slaughter at Northern States Beef, Inc. of Omaha, NE. I pay for all the pound cows Tom Lenz of Knoke Livestock Buyers, Inc. and I buy at the Algona, Iowa market. We used to fight for them but we get together at Algona now as we are sending them to the same place.

Respondent Farrow's affidavit contains two additional paragraphs of approximately the same length as those quoted above, which are not relevant to this proceeding.

17. Donald J. Prilipp, the owner and operator of the Algona stockyard, testified that he signed an affidavit on August 1, 1980 (the same date as respondent Lenz' affidavit), stating (Tr. 91):

"Knoke Livestock Buyers"—or "KLB," as we refer to them—"pays for the livestock he buys, and Leon Farrow pays for the livestock he buys. KLB buys cattle that are mostly feeders and heiferettes and does not buy pound cows when Leon Farrow is here. Leon Farrow buys pound cows when he is here."

Mr. Prilipp testified that the Packers and Stockyards investigator, Mr. Purnell, wrote the affidavit, but that he (Prilipp) "made some changes on it" in his own handwriting (Tr. 90).

18. On the six specific dates listed in the complaint, respondents' Farrow and Knoke purchased the following numbers of pound cows at the Algona stockyard (CX 22; see, also, CX 8-13, 23, 28-34; Tr. 84-85):

Date	Purchases of Pound Cows at Algona Stockyard	
	Respondent Farrow	Respondent Knoke
March 17, 1980	22	0
March 24, 1980	19	0
March 31, 1980	25	0
June 9, 1980	11	0
June 16, 1980	29	0
June 30, 1980	16	0

On each of these dates, the buyer for respondent Knoke bought other livestock at the Algona stockyard sale.

19. All of the pound cows bought by respondent Farrow on the dates referred to in Finding 18 were sold to Northern States Beef, Inc., together with a few bulls (usually one to three) also bought by respondent Farrow at the Algona stockyard on each of those dates. The pound cows and the few bulls were killed on a grade and yield basis, that is, Northern States paid respondent Farrow on the basis of the grade and weight of the dressed carcasses (Tr. 101). Northern States sent a typed or computer print-out settlement sheet to respondent Farrow relating to each of the dates referred to in Finding 18 (CX 29-34). Each settlement sheet shows the basis for the computation of the total amount paid to respondent Farrow. The total amount paid by Northern States to respondent Farrow is shown in the right hand column of each settlement sheet. Underneath the printed amount paid by Northern States, various handwritten computations were made by respondent Farrow (Tr. 67).

Respondent Farrow first deducted the cost of the pound cows and bulls from the amount paid by Northern States, which determined the gross profit on the transactions (CX 28-34; Tr. 67). He then subtracted trucking (*ibid.*; and Tr. 239-40), and at times, other expenses (CX 28-34), which determined the net profit. The net profit was then divided by two, on the printed settlement sheets, and respondent Farrow wrote a check to respondent Knoke for half the net profit plus, at times, the amount of the trucking or other expenses (CX 29-34; Tr. 67-70).

For example, with respect to the 29 pound cows and 1 bull bought by respondent Farrow on March 17, 1980, which were killed by Northern States on March 18, 1980, the following computations are shown on the settlement sheet (CX 29, at 1-2):

	16,220.54
	15,864.09
	356.55*
trk.	<u>251.25</u>
	<u>2)105.30</u>
	52.65
	<u>251.25</u>
	<u>303.90</u>

*Note: Should be \$356.45

The first figure, \$16,220.54, is the printed amount paid by Northern States. The other figures are in respondent Farrow's handwriting. Respondent Farrow subtracted the cost of the animals (\$15,864.09) from Northern States' payment, resulting in a gross profit of \$356.55 (Tr. 67). He then subtracted the \$251.25 trucking charge from the gross profit, resulting in a net profit of \$105.30 (Tr. 67). A check for half the

net profit (\$52.65) plus the trucking charge (\$251.25), totalling \$303.90, was sent by respondent Farrow to respondent Knoke (Tr. 67-68).

20. The half profits on the six transactions specifically referred to in the complaint, which were included in the checks sent by respondent Farrow to respondent Knoke Livestock Buyers, Inc., are as follows (CX 28-34):

<u>Purchase Date</u>	<u>Amount of Half-Profits Sent by Respondent Farrow to Respondent Knoke</u>	<u>Half-Profit</u>
March 17, 1980		\$ 52.65
March 24, 1980		207.42
March 31, 1980		271.74
June 9, 1980		335.47
June 16, 1980		249.75
June 30, 1980		98.18

21. When respondent Lenz received one-half of the net profit from respondent Farrow's sale of the pound cows and the bulls referred to in Findings 18, 19 and 20, respondent Knoke treated this as "livestock income" (Tr. 222), rather than as reimbursement for expenses.

22. During other sales at the Algona stockyard in the period March through June 1980, respondent Farrow also purchased pound cows, while respondent Knoke, although buying other livestock on each date, did not buy pound cows, as follows (see CX 8, 15, 22, 23, 24):

<u>Date</u>	<u>Purchases of Pound Cows at Algona Stockyard</u>	
	<u>Respondent Farrow</u>	<u>Respondent Knoke</u>
March 3, 1980	11	0
March 10, 1980	21	0
April 7, 1980	9	0
April 14, 1980	14	0
April 21, 1980	12	1
May 12, 1980	31	0 [*]
May 19, 1980	39	0
June 2, 1980	25	0
June 23, 1980	4	0

* Respondent Knoke bought 10 cows on this date, but since they were sold by the head (CX 23, at 56), they were bred cows, rather than pound cows (Tr. 121).

23. On the four days from March 3, 1980, through July 21, 1980, when respondent Farrow was not present at the Algona stockyard (see CX 7, 8, 22, 23), respondent Knoke purchased pound cows, as follows (CX 15, 22, 23 at 45-48, 24, 25, 26 at 1-3, 27 at 1-2):

Purchases of Pound Cows at Algona Stockyard
When Respondent Farrow Not Present

Date	Respondent Knoke
April 28, 1980	4
May 5, 1980	4
July 14, 1980	32
July 21, 1980	18

CONCLUSIONS

I. Evidence as to Respondents' Agreement and Practice.

Judge Baker's holding that complainant failed to prove a violation is based in part on her evaluation of the demeanor of the witnesses. It is the consistent practice of the Judicial Officer to give great weight to the findings of fact by administrative law judges since they have the opportunity to see and hear the witnesses testify.³ However, in rare cases, such as the present one, the Judicial Officer has reversed as to the facts, particularly where documentary evidence or interferences to be drawn from the facts are involved.⁴

In the present case, documentary evidence and respondents' testimony at the hearing overwhelmingly establish that respondents entered into an arrangement under which they did not compete against each other for the purchase of pound cows at the Algona Livestock Auction and Exchange, Algona, Iowa, but, instead, (i) respondent Farrow purchased pound cows at the Algona stockyard when he was present, (ii) respondent Knoke refrained from purchasing pound cows at Algona

³*E.g., In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Thurman*, 38 Agric. Dec. 1425, 1426-28 (remand order), *final decision*, 38 Agric. Dec. 1539 (1979) (affirming Judge Baker's dismissal of complaint where she accepted the testimony of respondent's wife, respondent's employee, and respondent's "real good friend" over that of three disinterested U.S.D.A. veterinarians); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (remand order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979).

⁴*E.g., In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1347 (1978), *aff'd*, No. 78-3134 (D. N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 753-56 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977). Also, see, *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 364-65 (1955); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492-97 (1951); *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285-86 (1933); *Southern Nat'l Mfg. Co. v. EPA*, 470 F.2d 194, 197 (8th Cir. 1972); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972); *OKC Corp. v. FTC*, 455 F.2d 1159, 1162-63 (10th Cir. 1972); *Nix v. NLRB*, 418 F.2d 1001, 1008 (5th Cir. 1969); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 742 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); Davis, *Administrative Law Treatise* (1958 & 1970 Supp.), §10.04.

(except on the rare occasions when respondent Farrow was not present), and (iii) respondents Farrow and Knoke shared the profits (and losses) on the pound cows bought by respondent Farrow at Algona.

The most telling documentary evidence consists of the affidavits signed by respondents Lenz and Farrow. Although neither respondent Lenz nor respondent Farrow remembers that he was sworn before signing his affidavit (Tr. 216, 227-28), neither denied being sworn, and Mr. Purnell, who wrote and witnessed the affidavits, testified categorically that both were sworn (Tr. 243-46).

The affidavits show that respondents had an arrangement under which respondent Farrow bought pound cows at the Algona stockyard when he was present, respondent Knoke refrained from buying pound cows at Algona when respondent Farrow was present, and respondents Knoke and Farrow split the profits on the pound cows when they were sold to Northern States Beef, Inc. Respondent Lenz states in his affidavit (Finding 15):

Weekly, KLB, its agent or employee, attends the Algona Livestock Auction and Exchange to buy livestock. KLB does not buy pound cows for resale and slaughter at this Algona auction market when Leon Farrow of Ledyard, Iowa is in attendance at the sale.

We have an agreement that Leon Farrow buys and pays for the pound cows and we split the profit when they are sold to Northern States Beef, Inc.

When Leon Farrow does not attend this sale KLB purchases and pays for the pound cows.

KLB and Leon Farrow sit together at the sale and buy the cows in a joint deal as we do not see ourselves as competitors as the cows we buy go to the same packer, Northern States Beef, Inc.

Similarly, respondent Farrow states in his affidavit (Finding 16):

I pay for all the pound cows Tom Lenz of Knoke Livestock Buyers, Inc. and I buy at the Algona, Iowa market. We used to fight for them but we get together at Algona now as we are sending them to the same place.

These sworn admissions against interest by both parties to the alleged joint adventure are weighty, documentary evidence supporting complainant's argument that respondents entered into an arrangement, agreement or understanding under which they did not compete against each other in the purchase of pound cows at the Algona stockyard.

Other documentary evidence showing all of the purchases of pound cows at the Algona stockyard by respondents Farrow and Knoke during the six specific dates alleged in the complaint, March 17, 24 and 31, and

June 9, 16 and 30, 1980, substantiate respondents' sworn admissions. On those six dates, respondent Farrow purchased 22, 19, 25, 11, 29, and 16 pound cows, respectively, at the Algona stockyard, while respondent Knoke purchased no pound cows, notwithstanding the fact that respondent Knoke's buyer was present at the Algona stockyard and bought other livestock on each of those dates (Finding 18).

Absent an agreement between respondents Farrow and Knoke that one would buy the pound cows at the Algona stockyard, there is no reasonable possibility that respondent Farrow would have outbid respondent Knoke to that extent. Before the alleged agreement, both buyers had been substantial buyers of pound cows at the Algona stockyard (Finding 10) "because they had the line of credit to pay for them" (Tr. 119). They were both selling pound cows to the same packing company and both knew daily what prices the packing company was paying for pound cows (Finding 11). Furthermore, respondent Knoke shipped more livestock to the packing company than respondent Farrow (Finding 11). It defies the laws of probability for respondents to contend that respondents Farrow and Knoke were actively competing against each other for pound cows at the Algona stockyard during the period involved in this case, but that respondent Knoke bought no pound cows on the six specific dates because respondent Farrow outbid him on each of the pound cows bought by respondent Farrow on those six dates.

Pound cows are generally sold one at a time at Algona (Finding 8). If it is assumed that each respondent had an equal chance, and was equally desirous, of buying each of the pound cows on the six dates specifically alleged in the complaint, under the laws of probability, respondent Farrow would have outbid respondent Knoke 11 times to 0 on 1 occasion out of 2,048 ($\frac{1}{2}$ to the 11th power); 16 times to 0 on one occasion out of 65,536 ($\frac{1}{2}$ to the 16th power); 19 times to 0 on one occasion out of 524,288 ($\frac{1}{2}$ to the 19th power); 22 times to 0 on one occasion out of 4,194,304 ($\frac{1}{2}$ to the 22nd power); 25 times to 0 on one occasion out of 33,554,432 ($\frac{1}{2}$ to the 25th power); and 29 times to 0 on one occasion out of 536,870,912 ($\frac{1}{2}$ to the 29th power).

Further documentary evidence shows that the six specific dates alleged in the complaint are not isolated, atypical examples, but, rather, reflect the pattern of purchases (and non-purchases) by respondents at the Algona stockyard on *all* of the other dates when the stockyard was open⁶ during the period from March 3 through July 21, 1980. Specifically,

⁶The record contains no evidence of purchases by respondents on May 26 or July 7, 1980, both of which were Federal holidays. I infer that the Algona stockyard was closed on those dates because of Memorial Day and Independence Day.

on nine other dates during that period, respondent Farrow bought 11, 21, 9, 14, 12, 31, 39, 25, and 4 pound cows, respectively, at the Algona stockyard, while respondent Knoke bought only one pound cow on one of the nine dates (Finding 22).

On the other hand, during the period from March 3 through July 21, 1980, on the four days when respondent Farrow was not present at the Algona stockyard, respondent Knoke purchased 4, 4, 32, and 18 pound cows, respectively (Finding 23).

This documentary evidence shows conclusively that the information set forth in respondents' affidavits is true; that is, that respondents Farrow and Lenz entered into an agreement whereby respondent Farrow bought pound cows at the Algona stockyard where he was present, and respondent Knoke did not buy pound cows at Algona when respondent Farrow was present.

Moreover, the documentary evidence shows that respondents Farrow and Knoke did indeed split the profits on the pound cows bought by respondent Farrow at the Algona stockyard. The net profit on each transaction was calculated in respondent Farrow's handwriting on the settlement sheets sent to respondent Farrow by Northern States Beef, Inc. The net profit was divided by 2 in respondent Farrow's handwriting, and a check for half the net profit plus certain expenses was sent by respondent Farrow to respondent Knoke for the pound cows (and a few bulls) bought by respondent Farrow at Algona on each of the dates specifically alleged in the complaint (Findings 19 and 20).

In view of the strong documentary evidence referred to above, I would find that respondents entered into an arrangement under which they did not compete against each other for the purchase of pound cows at the Algona stockyard, but, rather, agreed that (i) respondent Farrow would purchase the pound cows at Algona when he was present, (ii) respondent Knoke would not purchase pound cows at Algona when respondent Farrow was present, and (iii) respondents Knoke and Farrow would split the profits on the pound cows, irrespective of the strongest possible testimony to the contrary at the hearing. However, in this case, respondents' testimony at the hearing is, in the main, vacuous and vacillating, and, in vital respects, self-condemning.

Significantly, respondents admitted at the hearing that they shared the profits and losses on the pound cows bought by respondent Farrow at the Algona stockyard (Tr. 203, 220-22, 224, 239-40). Respondent Lenz admitted that he received "50 percent of the profits" (Tr. 220), or "half of the profits" (Tr. 222), on the pound cows bought by respondent Farrow at Algona. And respondent Farrow admitted that he gave "half of . . . [the] profits" (Tr. 239) on the pound cows bought at Algona to respondent Lenz. Judge Baker's observation (Initial Decision, Finding

10) that respondent Farrow's computation of the net profits (which he divided in half) did not reflect "net profit as that term is utilized in generally accepted accounting practices and procedure," for example, because "there is no allocation of overhead and other expenses that under proper accounting procedures would be correct charges against expenses," is irrelevant. The parties to the agreement were satisfied with a sharing of the net profits without regard to items such as overhead. Furthermore, it would make no difference to the outcome of this case whether the parties shared the profits 50-50, 51-49, 60-40, or in any other mutually satisfactory manner. But here the evidence shows (Findings 19 and 20), and respondents admit (Tr. 203, 220-22, 224, 239-40), that they shared the net profits (and losses) equally.

Those admissions by themselves, even in the absence of the weighty documentary evidence referred to above, would compel the inference that respondents agreed not to compete against each other in the purchase of pound cows at the Algona stockyard. Only a fool or an imbecile would bid at an auction market on certain livestock against the person with whom he was sharing the profits (or losses) on such livestock. Respondents are responsible businessmen, and, therefore, I would be compelled to infer that respondents agreed not to bid against each other on pound cows at the Algona stockyard solely on the basis of their admissions at the hearing that they shared the profits and losses on the pound cows.

But here there is no need to rely on the inference in view of respondents' affidavits and the other documentary evidence, discussed above, showing that the information in respondents' affidavits is true.

Respondent Farrow testified that he signed his statement just to get the Packers and Stockyards investigators "off of . . . [his] back" so that he could get at his farm work. He testified (Tr. 236-37):

A. Well, like I said, I didn't write it. They wrote in what they wanted, and after they was around there all day, I got a little sick of it, and I had plenty of work to do around the farm, and I signed it just to get them off of my back.

Q. Do you just sign anything?

A. Well, at that point, I was about ready to.

Q. You didn't know what you were doing when you signed that?

A. Yes, I knew what I was doing, but I knew we had lots of other work to do too.

It is incredible that a businessman would sign a very damaging admission, if it were not true, just so he could get rid of government investigators so that he could get at his farm work.

Moreover, respondent Farrow's denials of any agreement to restrict

trade consist only of answering "no" to leading questions on direct examination, couched in legalistic, ultimate conclusions, so that respondent Farrow could, perhaps without committing perjury, have answered "no" to each question notwithstanding an agreement with respondent Lenz that (i) he (Farrow) would buy the pound cows at Algona, (ii) respondent Knoke would not buy pound cows at Algona when respondent Farrow was present, and (iii) respondent Farrow would split the profits (and losses) on the pound cows with respondent Knoke. Specifically, respondent Farrow's denials are as follows (Tr. 229-30):

Q. Do you have a specific agreement—

A. No.

Q. —with Mr. Lenz, or any agent of Knoke Livestock Buyers, Inc.—

A. Absolutely not.

Q. —to control prices or have the effect of controlling prices of cattle bought by the pound for slaughter in commerce in Algona, Iowa?

A. No.

Q. Do you have an agreement, oral, or otherwise, with Tom Lenz, Knoke Livestock Buyers, Inc., or any agents of his corporation—

A. No.

Q. —to restrict competition in the purchase of cattle bought by the pound for slaughter in commerce?

A. No, we don't.

Q. More specifically, in the first half of 1980, the first six months in 1980, I ask you again, did you have any agreements to restrict trade, reduce competition or have the effect of controlling the prices of cattle purchased by the pound at the Algona Livestock Auction?

A. No, I did not.

Respondent Farrow might have felt that he could testify, without committing perjury, that his agreement with respondent Lenz did not "control prices" or "have the effect of controlling prices," and was not to "restrict competition" (*note, he was not asked whether his agreement would have the effect of restricting competition*) because the auction owner sets the starting price of the pound cows and the auction owner is free to buy the pound cows if the bids are not reflective of the fair market value.

Respondent Farrow's explanation as to why he gave respondent Lenz half of his profits is unclear, unconvincing, and contains a very damaging admission. He testified in response to a question by Judge Baker (Tr. 239-40):

Q. . . . Will you please explain why you didn't keep all of

the profits or take all of the losses? In other words, why would you give Mr. Lenz half of your profits? Would you explain that in your own words?

A. Well, that isn't hard to explain. If, like, say, they buy half the cattle, and I buy half the cattle and put them on the same truck, it's a mess to get straightened out. If I pay for them all, and when it's all done, why, you can take the trucking out, and if there's any profit left, or any loss left, it's a lot easier to do the bookkeeping on it.

It's as simple as that. If I had ten on there, and he had ten on there, why, we would have to figure out what his costs and what my costs and what the trucking was, and at the end of the time, one or the other of us would have all the money back and have to write out a check for ten cattle, plus the profit or loss, and it's just a lot easier to do the bookkeeping on it.

Respondent Farrow admitted that "you can take the trucking out" (Tr. 240), and the documentary evidence shows that he did in fact deduct the trucking in computing half the net profits (CX 29-34).

Where two persons share the same truck from a common origin to a common destination, a reasonable division of the trucking costs would be based upon the number of livestock (and possibly the weight and type of livestock) shipped by each person; or the trucking costs might be shared equally on the theory that each person had an equal opportunity to use half the truck on each occasion.⁶ But trucking costs are not in any manner determined or affected by the profit on a transaction. Rather, the profit is affected by the trucking costs. Hence to share profits as a method of sharing trucking costs is nonsensical, from a business, practical or logical viewpoint.

The half profit received by respondent Lenz for the pound cows purchased by respondent Farrow on March 17, 1980, was \$52.65. The half profit from the June 30, 1980, purchases was almost twice as much, \$98.18. The half profit from the June 9, 1980, purchases was over six times as much, \$385.47 (Finding 20). It is incredible for respondents to argue that such an erratic measure was used merely to allocate respondents' trucking costs.

I would find it just as easy to believe in the Tooth Fairy as to believe

⁶No opinion is expressed in this decision as to whether it would be lawful for two independent, competing dealers, who buy livestock at the same market, to enter into a continuous agreement to share a common truck in shipping livestock to the same packer. It would seem that such an agreement could, at least in some situations, tend to restrict competition if each dealer knew that he could not buy more than half a truck load of livestock at each sale. But it will be time enough to consider that issue if it is presented in a concrete factual setting.

that respondents Lenz and Farrow split the profits on the pound cows respondent Farrow purchased at Algona just because it was a "lot easier to do the bookkeeping" (Tr. 240) on their joint trucking costs. Logic compels me to infer that respondents entered into an arrangement whereby respondent Farrow bought the pound cows at Algona, respondent Lenz refrained from buying pound cows at Algona when respondent Farrow was present, and they shared the profits with each other on the pound cows in order to avoid competing against each other for pound cows at Algona, rather than merely as a convenient way to share their respective trucking costs.

Respondent Farrow's explanation as to trucking costs, quoted above, actually contains a very damaging admission because it recognizes that only one respondent was to buy the pound cows. That is, respondent Farrow testified (Tr. 239-40):

If, like, say, they buy half the cattle, and I buy half the cattle and put them on the same truck, it's a mess to get straightened out.

That implies that to avoid that "mess," only one respondent would buy all the pound cows. The next sentence in the explanation further supports that implication, *viz.* (Tr. 240):

If I pay for them all . . . it's a lot easier to do the bookkeeping on it.

The only way respondent Farrow would "pay for them all" would be for him to buy them all!

In short, respondent Farrow's testimony at the hearing does not conflict with respondents' affidavits, but, rather, admits (directly or by implication) that respondents agreed (i) that respondent Farrow would buy the pound cows at Algona, (ii) respondent Knoke would refrain from buying pound cows at Algona when respondent Farrow was present, and (iii) respondents would share the profits on the pound cows. And the other documentary evidence referred to above proves such an agreement beyond any doubt.

Turning to respondent Lenz' testimony at the hearing, he testified that he was interviewed by the Packers and Stockyards investigators while he was at the Gowrie auction on a "very warm day," and he was "in a hurry . . . to get back to the sale" (Tr. 209). The interview was conducted "across the street [from the auction] under a shade tree" (Tr. 209).

Here, again, I give no weight to respondents' suggestion that the affidavit was signed merely to hurry the interview so that respondent Lenz could get back to the business of buying livestock. It is incredible that a responsible businessman would sign an untrue admission against interest merely to hurry an interview so that he could get back to a single livestock sale. Furthermore, excluding the printed "boilerplate"

on pages one and three of respondent Lenz' affidavit, it consists of a single page, and respondent Lenz initialed two changes on that page (CX 7, at 2). There is no basis for believing that respondent Lenz did not read his affidavit with care.

Although respondent Lenz testified that he was surprised that he signed the statement (*i.e.*, his affidavit) (Tr. 215-16), he testified (Tr. 213):

Q. On August 1st, 1980, you were approached by Mr. Mike Purnell, and he, at that time—and also Mr. Merle Paulsen, as you have so testified, sir. You gave a statement at that time under oath, and you, yourself, said that you have before given statements to Packers and Stockyards so that you were well aware of what you were doing?

A. Yeah. You know, I said some things—these statements that I have signed that I signed that day, and the statements that I have signed before, was, generally, always written up by P and S Administration, and I was allowed to read it and sign it.

Q. And you're a reasonable man, and you can read, and you understand what you have signed when you do this; is this correct?

A. That's correct.

Respondent Lenz testified that he was surprised that he signed the statement (Tr. 215-16) because "we do not have an agreement" (Tr. 216). He also denied having an agreement not to bid against respondent Farrow, to restrict competition or to control prices at Algona (Tr. 199-202, 206, 212, 215-216).

However, elsewhere in his testimony, respondent Lenz admitted that he and respondent Farrow had a partnership on the cows going to Northern States, and that he regarded approximately half of respondent Farrow's purchases as being made for him (Lenz/Knoke). Specifically, respondent Lenz testified in response to questions asked by Judge Baker (Tr. 219-22):

Q. . . . Can you state, in your own words, what your relationship was with him [Farrow]? To begin with, is he related to you in any way?

A. No.

Q. Is your relationship with him one of a business and professional nature?

A. That's what I'd qualify it as, yes; business.

Q. Did you ever engage anyone else in a similar—or did you ever have a similar relationship with anyone else that would approximate the relationship you had with Mr. Farrow with respect to these cow purchases?

A. No.

Q. *Is it correct to state that you regarded half of the purchases made by Mr. Farrow were your purchases?*

A. *I would say approximately, yes. I think, you know, that the statement—you know, they showed us six different weeks, and I think if they'd go back, you know, maybe over more weeks or different periods of time, that they would find out that Knoke Livestock bought some of them cows, and they were shipped in a joint truck together, which—we have a partnership on the cows going to Northern States.* [Emphasis added.]

This is a significant admission which fully supports respondent Lenz' affidavit. He admits that he and respondent Farrow had "a partnership on the cows going to Northern States," and that he "regarded [approximately] half of the purchases made by Mr. Farrow" as being made for him (Lenz/Knoke) (Tr. 219-20). Partners do not compete against each other! Respondent Lenz' admission quoted above fully supports his affidavit.

Elsewhere in his testimony, respondent Lenz appears to be expressing the view that he and respondent Farrow did not compete against each other so that they would not end up with a half load of cows. He testified (Tr. 210):

A. They asked me several questions, and we had a conversation, and they asked the questions about the cows; "are they Algona"? And they asked me how we were shipping the cows, and I told them that it would be just like, you know, if they was buying cows, and they was both shipping to Northern States, wouldn't it be ridiculous if they didn't ship together to Northern States, *then to compete and try to end up with a half a load of cows?* (Emphasis added.)

Although I am not sure whether respondent Lenz' sentence structure was poor or the reporter left out a word or two, he seems to be expressing the view that his arrangement with respondent Farrow was better "than to compete and try to end up with a half a load of cows." His desire to have an arrangement with respondent Farrow to avoid "half loads" of pound cows is further shown in his testimony quoted immediately below.)

Respondent Lenz also testified that the reason he and respondent Farrow shared the profits on the pound cows was merely to split the transportation costs. He testified (Tr. 203-04, 220-22):

[FURTHER DIRECT EXAMINATION (Tr. 197)]

Q. Now, the United States Government, by their clients and by the P and S people, they have restricted, in their Complaint, specific days that you allegedly shipped with Mr. Farrow—

shipped cattle and received a check from Mr. Farrow. Is that true?

A. Yes; that we received part of the profits on the cows.

Q. Okay. Was the purpose of sharing the profits on those cows as by the agreement; that Mr. Farrow would buy those cows for you?

A. It was by the agreement that we could not get enough cows to make one load with cows out of there, and it would be ridiculous for us to try to ship half loads of cows to Northern States when we were both shipping to the same packing company.

[EXAMINATION BY JUDGE BAKER (Tr. 218)]

Q. Well, now, on those occasions, did he send you a check for an alleged 50 percent of the profits?

A. Right; because of the transportation of moving those cows to Omaha, it only seems reasonable—you know, it only makes good sense to put these cows in the same truck, rather than both of us try to have half loads and try to ship 210 miles from Algona, Iowa, to Northern States Beef, where we both ship our cows to.

Q. Mr. Lenz, what I'm trying to get at, and I will ask this of Mr. Farrow, why didn't Mr. Farrow keep all the profits? If he purchased them—purchased the cows, and he could sell them to Northern States, why didn't he keep the whole thing? Why would he give you half of it?

A. I would say that it would be because we shipped the cows together; and, like I say, evidently these six times that he did—I guess I haven't seen them, but I understand that he owned all them cows in them six purchases, but some of them times Knoke Livestock owned them cows in those purchases.

Q. When he made the purchases, did he pay for them out of his own account, his own money?

A. Yes.

Q. Knoke did not advance money to him to pay for them?

A. No.

Q. And he owned the cows. He went to the auction after he purchased them, and he owned the cows, and he wanted to ship them to Northern States. Are you saying that you offered him a service or an opportunity to ship his cows with your cows for which he computed the amount to be paid to you as half of the profits?

A. Right.

Q. Is that a correct statement, I'm asking?

A. Right.

Q. It is correct.

Do you know when your company received these checks, how they were reported to your books?

A. It would be reported as livestock income; and, like I say, a lot of times it would be paid—you know, we owned part of these cattle also in this shipment.

Q. You mean in every shipment?

A. Not in every shipment, because, as I see these six that they had here today, I believe they have the shipments that—

Leon [Farrow] owned all them cattle in them shipments.

As stated above, it is incredible that respondents Farrow and Lenz shared the profits on the pound cows purchased at the Algona stockyard merely as a convenient method of sharing the trucking costs. Trucking costs are not in any manner determined or affected by the profit on transaction. If respondents were really interested only in sharing trucking costs, they would not have had to agree for one of them to buy a the pound cows; they could each have shipped half loads of pound cows on the same truck (see note 6, *supra*).

In short, although portions of respondent Lenz' testimony at the hearing contradict respondents' affidavits, his testimony is generally incredible and, moreover, contains very damaging admissions that lend great support to the affidavits.

Additional weighty evidence supporting respondents' affidavits is in the testimony by Donald J. Prilipp, owner and operator of the Algona stockyard. He testified that he signed an affidavit stating that "KLJ [Knoke Livestock Buyers, Inc.] . . . does not buy pound cows when Leon Farrow is here. Leon Farrow buys pound cows when he is here (Finding 17). Although Mr. Prilipp testified that respondents did not "control . . . [his] market in the first half of 1980 for cattle bought by the pound for slaughter in commerce," or "drive buyers away" from his market (Tr. 121-22), he did not repudiate his affidavit, and he admitted that he had made some changes on his affidavit in his own handwriting (Tr. 90). Hence Mr. Prilipp's testimony as to his affidavit gives strong support to complainant's contention that respondents agreed that (i) respondent Farrow would buy the pound cows at the Algona stockyard when he was present, and (ii) respondent Knoke would not buy pound cows at Algona when respondent Farrow was present.

In this administrative proceeding, complainant is required to prove its case only by a preponderance of the evidence. *See Steadman v. SEC*

450 U.S. 91, 92-104 (1981); *In re: Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-314 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980). But, in any event, complainant has proved here beyond any doubt that respondents entered into an agreement that (i) respondent Farrow would buy the pound cows at Algona when he was present, (ii) respondent Knoke would refrain from buying pound cows at Algona when respondent Farrow was present, and (iii) respondents would share the profits on the pound cows.

I am compelled to infer that respondents' agreement was entered into in order to avoid competing against each other for pound cows at Algona. Key admissions at the hearing by respondents Farrow and Lenz, discussed above, support that inference.

II. Evidence as to the Effect of Respondents' Agreement and Practice.

Respondent's agreement—that (i) respondent Farrow would buy the pound cows at the Algona stockyard when he was present, (ii) respondent Knoke would refrain from buying pound cows at Algona when respondent Farrow was present, and (iii) respondents Knoke and Farrow would split the profits (or losses) on the pound cows—directly and significantly injured competition for pound cows at the Algona stockyard during the period specifically alleged in the complaint, *i.e.*, March 17 through June 30, 1980.

The undisputed evidence shows that prior to that agreement, respondents Farrow and Knoke were the principal buyers of pound cows at the Algona stockyard (Finding 10). Although there were other buyers present at the stockyard, they were primarily interested in other types of livestock (Finding 10). When the two principal buyers of a particular type of livestock at an auction market enter into an agreement under which they no longer bid against each other for that type of livestock but, rather, only one of the two buys that type of livestock and shares the profits with the other, competition for that particular type of livestock at that auction market has been directly and significantly injured.

The undisputed evidence shows that respondent Knoke's buyer was present at every sale held by the Algona stockyard during the period from March 3 through July 21, 1980, but that with the exception of one pound cow, respondent Knoke purchased no pound cows at the Algona stockyard except on the four days respondent Farrow was not present (Findings 18, 22, 23). The injury to competition for pound cows by the elimination of one of the two principal buyers is manifest. The certified public accountant who prepares respondent Knoke's tax returns testified that respondent Knoke's net profit is only about "three-tenths of 1 percent," and, therefore, the corporation needs an "exceptionally large volume" (Tr. 150). Absent the agreement, respondent Knoke would have

been bidding on, and buying, a substantial number of the pound cows offered for sale at Algona.

Although there is no direct evidence that the elimination of one of the two principal buyers of pound cows at Algona adversely affected producer prices, the natural inference from such evidence, and the inference which I draw, is that prices for pound cows at the Algona stockyard were adversely affected by the direct and significant injury to competition resulting from respondents' agreement.

It would be virtually impossible for complainant to prove by direct evidence that prices for pound cows at the Algona stockyard were adversely affected by respondents' agreement. The pound cow market is a very specialized market. Only 15 to 45 pound cows are offered for sale each week at Algona (Finding 9), only a few buyers are interested in such animals (Finding 10), and only a very limited ultimate market exists for such animals in the Algona area (Tr. 201-02).

During the time period involved here, pound cows were sold at the Algona stockyard at prices generally ranging from \$34.25 per cwt. to \$53.25 per cwt., and the prices frequently varied by as much as \$6 to \$10 per cwt. on a single day (Finding 8). It would be beyond the expertise of an economist or a livestock marketing specialist to be able to express an expert opinion as to whether a particular cow should have sold, *e.g.*, for \$46.75 per cwt. rather than \$46.50 per cwt. In fact, it would be beyond the expertise of an economist or a livestock marketing specialist to testify as to the true value of a particular pound cow even to the nearest dollar per cwt. Expert testimony of such a nature would be no more reliable than expert testimony that the value of a particular used car sold at an automobile auction was actually \$575, rather than \$570.

I give little weight to the self-serving testimony by Donald J. Philipp, owner and operator of the Algona stockyard, and respondents, that farmers received fair prices for their pound cows sold at Algona during the first half of 1980 (Tr. 105-06, 207, 229). They all had a self-interest in defending the fairness of the prices received by farmers for pound cows at Algona. Although two other livestock buyers at Algona testified similarly (Tr. 165, 173), they were in no better position than an economist or an expert livestock marketing specialist to know whether a particular pound cow would have brought an additional 25 cents, 50 cents, 75 cents, or dollar, per cwt., in the absence of the agreement by the two principal buyers which withdrew one as a buyer of pound cows at the market.

No one but respondent Knoke's buyer knows whether he would have bid an extra 25 cents, or more, per cwt., for a particular pound cow, in the absence of respondents' agreement. It would be putting far too much burden on the Government to require it to obtain an admission from

respondent Knoke's buyer in order to prove an actual adverse effect on producer prices.⁷

Mr. Prilipp conceded the obvious, that "when you have more than one person bidding on a particular livestock, this will increase the price" (Tr. 93-94). I infer that when one of the two principal buyers for a particular type of livestock refrains from bidding at a stockyard over a period of months because of an agreement with another dealer, the price for that type of livestock is lowered, at least by a small amount, if not by a substantial amount.

Although any auction market operator has the opportunity, and perhaps the duty, at times, to buy livestock as market support when the bids do not reflect the true value of the livestock (Tr. 93, 105), it is not practical or desirable for a market to buy livestock for market support on a substantial and regular basis. The market operator should, rather, seek additional buying power for the market. The regulations issued under the Act prohibit a market operator from speculating in consigned livestock, and if a market operator regularly bought substantial volumes of a particular type of livestock at his market, allegedly as market support, an investigation would be warranted to determine whether the market was illegally speculating in consignments. See, e.g., *In re Bosma*, 41 Agric. Dec. 1742, 1750-51 (1982), *appeal docketed*, No. 83-7069 (9th Cir. Jan. 28, 1983).

In any event, the opportunity for the market operator to buy pound cows for market support does not militate against drawing the natural inference that prices for pound cows were adversely affected, at least to some extent, by respondents' agreement under which one of the two principal buyers of pound cows at the Algona stockyard no longer competed for their purchase.

Moreover, although *actual injury to producer prices* in this case is based only on an inference, rather than direct evidence, *actual injury to competition* is proven in this case by undisputed evidence. As shown in the following section of this decision, *injury to competition*, or even likely *injury to competition*, is all that is required to be shown here. It is not necessary to also show *injury to prices*.

⁷ Larry Melco, the buyer who usually attended the Algona stockyard sale for respondent Knoke (Tr. 87), was not called by respondents as a witness. Under the settled principle frequently applied in administrative and judicial proceedings (*In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982) (and cases cited therein), *aff'd*, No. 82-1157 (D. N.J. Jan. 24, 1983), *appeal docketed*, No. 83-5098 (3d Cir. Feb. 9, 1983)), I infer that his testimony would have been adverse to respondents. However, complainant's case is well established without that inference.

III. Respondents' Agreement and Practice Violated the Act and Regulations.

Section 201.70 of the regulations provides (9 C.F.R. §201.70):

§201.70 Restriction or limitation of competition between packers and dealers prohibited.

Each . . . dealer engaged in purchasing livestock, in person or through employed buyers, shall conduct his buying operations in competition with, and independently of, other . . . dealers similarly engaged.

Respondents' agreement and practice was in direct violation of this regulation. Respondents Knoke and Farrow are both dealers registered under the Act (Findings 2 and 5). Instead of conducting their buying operations in competition with, and independently of, each other, respondents entered into a "partnership" (Tr. 220) in the purchase of pound cows at the Algona stockyard. Instead of competing against each other, respondents agreed that (i) respondent Farrow would buy the pound cows at Algona when he was present, (ii) respondent Knoke would refrain from buying pound cows at Algona when respondent Farrow was present, and (iii) respondents would share the profits (or losses) from such transactions.

Respondents' practice pursuant to that agreement was an "unfair" practice prohibited by §312(a) of the Act (7 U.S.C. §213(a)), which provides:

§213. Prevention of unfair, discriminatory, or deceptive practices

(a) *It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.* [Emphasis added.]

The same broad terms, "unfair, unjustly discriminatory, or deceptive practice or device," are used in §202(a) of the Act with respect to packers and live poultry dealers or handlers (7 U.S.C. §192(a)). Since those broad terms are not defined in the Act, "their meaning must be determined by the facts of each case within the purposes of the Packers and Stockyards Act." *Capitol Packing Co. v. United States*, 350 F.2d 67, 76 (10th Cir. 1965).

The Packers and Stockyards Act is a product of the same era that produced §3 of the Interstate Commerce Act in 1887 (prohibiting undue

preferences),⁸ the Sherman Anti-Trust Act in 1890 (15 U.S.C. §§1-7), §2 of the Clayton Act in 1914 (prohibiting specified discriminatory pricing (15 U.S.C. §13), and §5 of the Federal Trade Commission Act in 1914 (prohibiting unfair methods of competition in commerce) (15 U.S.C. §45 (1976 & Supp. V 1981)). Since those Acts were not adequate to deal with the problems of the livestock and meat industries, Congress enacted the Packers and Stockyards Act in 1921. The legislative history of the Packers and Stockyards Act shows that it was intended to be broader in scope and to go further in the prohibition of undesirable trade practices than the foregoing statutes.⁹

The extraordinary scope of the regulatory authority granted to the Secretary of Agriculture under the Packers and Stockyards Act was expressed in the House report as follows (H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921)):

A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

The Packers and Stockyards Act is "remedial legislation." *Stafford v. Wallace*, 258 U.S. 495, 521 (1922). "The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen. *Stafford v. Wallace*, 258 U.S. 495, 521, . . .; *Safeway Stores, Inc. v. Freeman*, . . . 369 F.2d 952, 956 (1966)." *Swift & Co. v. United States*, 893 F.2d 247, 253 (7th Cir. 1968). *Accord, Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1336 (8th Cir. 1971); *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966).

The Secretary "has broad powers under Section 202(a) with regard to trade practices which are 'unfair' in that they conflict with the basic policies of the various antitrust statutes, even though the practices may

⁸Interstate Commerce Act, ch. 104, §3, 24 Stat. 380 (1887) (current version at 49 U.S.C. §§10701(e), 10741, 10742 (Supp. IV 1980)).

⁹*Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962); *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961); and see *Armour & Co. v. United States*, 4 F.2d 712, 722 (7th Cir. 1968); *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Crossee & Blackwell Co. v. FTC*, 262 F.2d 600, 604 (4th Cir. 1959); *In re DeJouy Packing Co.*, 36 Agric. Dec. 1181, 1204 (1977), *aff'd*, 618 F.2d 1329, 1335 n. 7 (9th Cir. (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); 22 Colum. L. Rev. 68 (1922).

not actually violate those statutes."¹⁰ "Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission (15 U.S.C. §45) and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic." *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968).

It is well settled that where a practice injures competition, or is likely to injure competition, in the livestock or meat industries, it is an "unfair" practice in violation of §§202(a) or 312(a) of the Act.¹¹ It is further settled that the Packers and Stockyards Act is designed to "prevent potential injury by stopping unlawful practices in their incipiency." *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966), quoting from *Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957).¹² In the present case, however, actual injury to competition is established by undisputed evidence (see §II, *supra*).

Numerous decisions, some favorable and some unfavorable to the Department, show that respondents' practice pursuant to their agreement is an "unfair" practice in violation of the Act and §201.70 of the regulations. The leading decisions are summarized immediately below.

In *Swift & Co. v. United States*, 308 F.2d 849, 852-53 (7th Cir. 1962), the court held that an agreement between Swift and a dealer for the dealer to buy all the top-grade hogs at an auction market and resell to Swift whatever quantity Swift wanted, at the same price paid by the dealer plus trucking charges, violated §202 of the Packers and Stockyards Act because of its injury to competition. The court held (308 F.2d at 853):

An agreement among packers to eliminate competition was held illegal under the Sherman Antitrust Act in *Swift & Company v. United States*, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518. It was held in that case that the "defendants cannot be

¹⁰ *Armour & Co. v. United States*, 402 F.2d 712, 717 (7th Cir. 1968); and see *DeJong Packing Co. v. USDA*, 618 F.2d 1329, 1335 n. 7 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); cf. *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392, 394, 396 (1953) (construing "unfair" method of competition under FTC Act).

¹¹ *DeJong Packing Co. v. USDA*, 618 F.2d 1329, 1336-37 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *Armour & Co. v. United States*, 402 F.2d 712, 717-27 (7th Cir. 1968); *Swift & Co. v. United States*, 393 F.2d 247, 253-54 (7th Cir. 1968); *Swift & Co. v. United States*, 308 F.2d 849, 853 (7th Cir. 1962); *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961).

¹² Cf. *FTC v. Texaco, Inc.*, 393 U.S. 223, 225-26 (1968); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320-22 (1966); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959); *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392, 394-95 (1953); and *Corn Prods. Refining Co. v. FTC*, 324 U.S. 726, 738 (1945) (all involving incipiency doctrine in FTC cases).

ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete." 196 U.S. at page 400, 25 S.Ct. at page 281.

We hold the agreement between competitive buyers to split or share the purchase of top grade hogs as was done by petitioner and Askins at Scots Hill market constituted a violation of sec. 202 of the Act. The essential nature and the necessary result of this arrangement or practice was to eliminate competition.

In another *Swift* case, decided six years after the preceding case, *Swift & Co. v. United States*, 393 F.2d 247, 253-55 (7th Cir. 1968), Swift and American Stores Company had salaried lamb buyers in the Western Slope lamb marketing area in Colorado but refrained from bidding on fat lambs against the principal dealer in the area. Instead, they purchased their fat lambs from the area's principal dealer at higher prices than the dealer had paid to the purchasers. The court held that this was an "unfair" practice, in violation of §202(a) of the Act and §201.70 of the regulations, because of its "possible" adverse effect on producer prices. The court stated (393 F.2d at 253-55):

Petitioners' principal argument is that the Packers and Stockyards Act does not interdict their refusal to purchase fat lambs from producers while confining most of their Western Slope purchases to dealer Harry Heath & Son. Under the Sherman Act, it is true that a simple refusal to deal is permissible. *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992; *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505. However, the statutory prohibitions of Section 202 of the Packers and Stockyards Act are broader and more far-reaching than the Sherman Act or even Section 5 of the Federal Trade Commission Act. *Swift & Company v. United States*, 308 F.2d 849, 853 (7th Cir. 1962). Section 202(a) of the Act does not require the Government to prove injury to competition. *Wilson & Company v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961). The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen. *Stafford v. Wallace*, 258 U.S. 495, 521, 42 S.Ct. 397, 66 L.Ed. 735; *Safeway Stores, Inc. v. Freeman*, 125 U.S.App. D.C. 175, 369 F.2d 952, 956 (1966).

If petitioners had purchased their Western Slope fat lambs independently of Heath, their additional competition could have resulted in higher prices to the producers. The lack of com-

petition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the Packers and Stockyards Act was directed. Meat Packer Legislation hearings before the House Committee on Agriculture, 66th Cong., 2d Sess., pp. 22, 229, 250, 303, 1047, 2284 (1920).

Applying the rule of reason to these facts, the Judicial Officer could and did conclude that the natural effect and apparent purpose of Swift's and American Stores' buying practices were to restrict and lessen competition in the purchase of fat lambs from producers to the detriment of the producers, and that such practices were "unfair" to the lamb producers in the Craig-Montrose area.

In *Wilson & Co. v. Benson*, 286 F.2d 891, 892-96 (7th Cir. 1961), the court held that Wilson engaged in an "unfair" practice in violation of §202(a) of the Act when it granted drastic price reductions to many of its customers on meats and meat products in an effort to regain business lost when an employee of Wilson quit and went into business for himself. In sustaining the administrative order, the court held (286 F.2d at 895):

Wilson insists that the Secretary's order cannot stand because there is no finding or conclusion that its program of price-cutting was for the purpose of acquiring a monopoly or eliminating a competitor. However, the language in section 202(a) of the Act does not specify that a "competitive injury" or a "lessening of competition" or a "tendency to monopoly" be proved in order to show a violation of the statutory language. To repeat, that section provides it shall be unlawful for any packer to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce."

Although the court in *Wilson* clearly held that proof of competitive injury is not necessary to prove a violation of §202(a), in its statement of the case the court referred to the Judicial Officer's findings that Wilson's discriminatory price-cutting campaign was waged "to lessen competition by Reliable Meat Company and other competitors in the San Francisco area," and that "the acts of respondent diverted substantial business from competitors to itself and adversely affected the hotel and restaurant supply business in the San Francisco area" (286 F.2d at 894).

Relying on those findings, the court in *Armour & Co. v. United States*, 402 F.2d 712, 718, 722 (7th Cir. 1968), read the *Wilson* case narrowly, stating that *Wilson* "pointed out that the *literal language* of Section 202(a) does not specify that a competitive injury or a lessening of competition or a tendency to monopoly be proved," but that the "*Wilson*

case does not support the Department's view that neither intent nor some kind of competitive injury is necessary for the operation of Section 202(a)" (402 F.2d at 718).

In *Armour*, the court set aside a decision by the Judicial Officer which held that Armour violated §202(a) and (b) of the Act when it offered consumers a 50 cents coupon refund on the purchase of a two-pound package of thick-sliced bacon during a five-week promotional period in Alaska, Hawaii, Oregon, Washington, and most of California.

The court held that a "coupon program of this nature does not violate Section 202(a), absent some predatory intent or some likelihood of competitive injury" (402 F.2d at 717). The court held that Armour's program was intended to increase bacon consumption, but not necessarily at the expense of its competitors, and that its "spirited competition, beneficial to consumers and not hurtful to its competitors, should not be indicted in the name of antitrust" (402 F.2d at 720).

As to the likelihood of competitive injury, the court held that the Judicial Officer's finding that the coupon plan seriously disrupted other packers' bacon business was not supported by the record, and that almost as many competitors showed sharp rises in sales as losses; and there was no suggestion that the program had a lasting effect (402 F.2d at 722-25). The court found no probative evidence to show that the overall sales of any single competitor of Armour declined during the time of the promotion (402 F.2d at 725). Presumably, the court would have upheld the Judicial Officer's order if it had determined that there was a likelihood of competitive injury from Armour's conduct.¹³

In *Central Coast Meats, Inc. v. USDA*, 541 F.2d 1325, 1326-28 (9th Cir. 1976) (2-1 decision), the court reversed a decision by the Judicial Officer holding that it was an unfair practice in violation of §§202(a) and 312(a) of the Act for the same two individuals (the Habibs) to be engaged in business as a livestock dealer (Habib Cattle Company (HCC)) and also to be engaged in business as a packer (Central Coast Meats, Inc. (CCM)). The Judicial Officer found that by unifying their buying operations, they reduced the number of bidders at sales (by one), which would adversely affect the prices paid to producers. The court, in reversing, held (541 F.2d at 1327-28):

The evil inherent in a failure to compete is that it actually

¹³ The Judicial Officer stated in a subsequent case that "[t]he Department would never have contended that the practice found by the Court to exist in *Armour*, under the circumstances found by the Court to exist in *Armour*, was an 'unfair' practice." *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 172 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision).

ported to Montreal, Canada would have made good delivery except for problems during transit. The record shows that the lettuce left California on April 9, 1982, and arrived in Montreal on or about April 15, 1982, receiving a Canadian inspection at 1:00 p.m. on April 15, 1982. Six days for transportation from California to Montreal, Canada is within the range of that which is normal, although perhaps slightly on the high side. The instructions to the trucker were that the lettuce was to be transported at between 34° and 36°F. The undisputed evidence provided in the form of a Ryan thermometer tape of temperatures shows that the temperature ranged from 39° to 45°F during the trip. This is somewhat above the preferred transport temperatures, but we find it hard to draw the conclusion that over a six day period such slight increase in temperature over the preferred temperature could result in lettuce having 22% condition defects at the time of arrival. There is undisputed evidence in the record that the lettuce was loaded in California after a hard rain, thereby making it of weak keeping quality. We are inclined to believe that this is the essential reason why, on arrival, the truckload of lettuce had such a large percentage of condition defects. As reflected above, pursuant to 7 CFR 46.44(a)(2) when a contract does not specify the grade for the lettuce or the percentage of condition defects which it may contain, the lettuce at destination may contain only 15% of the heads which are damaged by condition defects, with not more than 9% of such defects being serious damage and not more than 5% being decay affecting any portion of the head exclusive of the wrapper leaves. In and of itself an average of 18% of the heads had slimy decay, a serious condition defect. See 7 CFR section 51.2531 and 51.2533. We find that 18% slimy decay on the heads of lettuce plus 3% russet spotting on the head leaves and 1% slimy decay on the wrapper leaves is far more than is tolerable at destination given the transportation conditions with which we are here concerned. Therefore, we conclude that the lettuce was not in suitable shipping condition when loaded.

Respondent's customer in Montreal provided an account of sales with respect to the truckload of lettuce, having handled it on a consignment basis. The account of sales showed that it remitted to respondent a net of \$2,701.17. The account of sales was complete insofar as all cartons of lettuce are accounted for, and accurately reflects the price fetched for the lettuce, as well as the cost involved in disposing of it. Therefore, we conclude since respondent claimed no other deductions that complainant is entitled to the \$2,701.17 remitted to respondent, rather than the contract price of \$7,655.85.

Respondent is liable for the full purchase price of the truckload of lettuce which was shipped to Philadelphia, Pennsylvania in the amount of \$8,101.60 and for the net price fetched with respect to the truckload

of lettuce sent to Montreal, Canada in the total amount of \$2,701.17 for a total liability of \$10,802.87. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$10,802.87, with interest thereon at the rate of 13 per cent per annum from May 1, 1982, until paid.

Copies of this order shall be served upon parties.

(No. 22,984)

COOK SALES COMPANY v. FOOD CITY, INC. PACA Docket No. 2-6147.
Decided October 13, 1983.

Invoices as proof of contractual relationship—Timely invoices—Broker's memorandum of sale.

Where respondent denies that it entered into a contract with seller, the seller's invoice is not proof there was an agreement.

Edward M. Silverstein, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Ross D. Blakeley, Phoenix, Arizona, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$277.50, in connection with two loads of cabbage shipped in interstate commerce.

A copy of the Department's report of investigation was served on each of the parties. Also, respondent was served with a copy of a formal complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages does not exceed \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Under this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition the parties were given the opportunity to submit further evidence by way of verified statements. Complainant filed a verified opening state-

ment, and respondent submitted a verified answering statement. Also, complainant filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership, composed of Charles Blevins, Nolan Cook, and John Davis, doing business as Cook Sales Company, whose mailing address is 15607 North 20th Street, Phoenix, Arizona 85022.

2. Respondent, Food City Inc., is a corporation whose mailing address is P.O. Box 20187, Phoenix, Arizona 85036, which is physically located at 16th Street and Mohave, in Phoenix, Arizona. At all pertinent times, respondent was licensed under the Act.

3. On or about August 20th and 23rd, 1981, September 14, 16, 26, 1981, and October 4, 1981, complainant shipped six loads of cabbage to Mr. William J. Danilson, a/k/a Dan Danilson, d/b/a Happy Dan's Produce, and also d/b/a Prima Fruit Company, hereinafter sometimes referred to as "Mr. Danilson," 3150 East Washington Street, Phoenix, Arizona 85034, as follows:

<u>Date</u>	<u>Shipping Point</u>	<u>Quantity</u>
8/20/81	Center, Co.	498
8/23/81	Center, Co.	300
9/14/81	Center, Co.	690 sacs 80 ctns
9/16/81	Center, Co.	857
9/26/81	Center, Co.	830
10/4/81	Center, Co.	701 sacs 110 ctns

All of the bills of lading indicated that the receiver was Prima Fruit Company and indicated that they were to be delivered to it at 32nd Street in Washington which was Mr. Danilson's address. As more fully set forth in Finding of Fact 4, below, Mr. Danilson shipped cabbage to respondent in September and October 1981. However, such cabbage was not identified as being that which complainant shipped to Mr. Danilson.

4. During the period September 3, 1981 through October 6, 1981, the respondent received six shipments of cabbage from Mr. Danilson as follows:

<u>Date</u>	<u>Quantity</u>	<u>Unit Price</u>	<u>Amount</u>
9/3/81	50	4.75	237.50
9/16/81	50	4.75	237.50
9/18/81	50	4.75	237.50
9/23/81	30	4.75	142.50
9/28/81	30	4.75	142.50
10/6/81	20	4.75	95.00

On or about September 30, 1981, Mr. Danilson billed the respondent for the 30 cartons of cabbage shipped on or about September 28. Respondent paid Mr. Danilson in cash on October 3, 1981, for this shipment. Respondent did not receive any cabbage from Mr. Danilson during the month of August 1981.

5. On or about December 2, 1981, the complainant wrote respondent a letter enclosing copies of invoices for two shipments of cabbage allegedly shipped to the latter in August and September, and demanding prompt payment thereof. The receipt of this letter from the complainant was the first notice that respondent had that complainant was holding it responsible for the two subject shipments. Upon receipt thereof, respondent telephoned complainant, objected to the billing, and, in addition, demanded proof, such as proof of delivery, which would indicate that respondent should be held liable for the two subject shipments. Complainant did not reply to respondent's request.

6. No broker's memorandum of sale were issued as to any of the shipments involved herein.

7. The formal complaint was filed on May 10, 1982 which was within nine months of when the cause of action stated herein accrued.

CONCLUSIONS

The dispositive issue here is whether complainant has proved that a contractual relationship existed between it and respondent. Complainant has the burden of proof on this matter. *New York v. Sandler*, 32 Agric. Dec. 702 (1973). The only proof offered by complainant is its undated invoices addressed to respondent. From there, complainant argues that, since respondent received the invoices and did not contact complainant to raise objection to them, such failure to object was proof a contractual relationship between the parties. However, while it is true that an invoice from which a buyer has failed to object may serve as proof of a specific contractual provision, *Casey v. Albanese*, 31 Agric. Dec. 311 (1972), an invoice may not serve as proof of the existence of a contract when the alleged buyer, as here, denies the existence of any contractual arrangement at all.

Other evidence also mandates against a decision in complainant's favor. There is no evidence that complainant sent out a timely billing to respondent for each of the shipments. Complainant only says it sent out the undated invoices to respondent "three or four days after the date of shipment." Respondent, however, says it did not receive any invoice from complainant until at least December 7, 1981. As noted in Finding of Fact No. 4, the respondent paid Mr. Danilson in cash for the one shipment of cabbage which may be a subject of this action. In addition

Mr. Danilson has submitted a statement in which he admits selling that load of cabbage to respondent and receiving payment from respondent for it.

Other facts which go against complainant are that, in spite of its claim that Mr. Danilson acted as a broker, Mr. Danilson did not issue any broker's memorandum of sale. If Mr. Danilson was a broker as to these transactions as was claimed by complainant this could have been proven by such memorandum. Cf., *Royal Packing Co. v. Grand Pr. Prod.*, 34 Agric. Dec. 1743 (1975), wherein a respondent broker who was alleged to be a buyer had issued a broker's memoranda and was held to be a broker and not a buyer. Moreover, copies of written requests for such memoranda from complainant would have served as proof that complainant really believed that Mr. Danilson was acting as a broker. Since there is no such evidence, but there is evidence that complainant listed Mr. Danilson as the consignee on the bills of lading involved in these two shipments, we cannot hold that he acted as a broker as to these transactions.¹

Furthermore, the amount of cabbage shipped by complainant to Mr. Danilson over this period of time is far in excess of that which the respondent received from him. See Findings of Fact Nos. 3 and 4 above.

On the basis of all of the evidence in the record, we cannot hold that complainant satisfied its burden of proof that there was a contractual relationship between it and respondent. Accordingly the complaint should be dismissed. *Royal Packing Co. v. Grand Prairie Prod. Brokerage*, 34 Agric. Dec. 1600 (1975).

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,935)

PEMBERTON PRODUCE, INC. v. TOM LANGE COMPANY, INC. PACA
Docket No. 2-6153. Decided October 18, 1983.

Invoices as proof of contract terms—Wrongful rejection—Partial inspection.

Although an invoice is the best evidence of contract terms, other evidence may offset it. Where buyer did not overcome weight of invoice its rejection of lettuce was wrongful, and partial inspection of load held insufficient to show condition of entire load.

¹The word "consignee" appears to be a euphemism for "buyer" in this instance.

Dennis Becker, Presiding Officer.

Matthew McInerney, Newport Beach, California for complainant.

LeRoy W. Gudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AN ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$18,241.50 in connection with the sale of two truckloads of lettuce in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant. In addition, respondent filed a counterclaim in the amount of \$7,261.00. Complainant filed an answer to the counterclaim. The amounts claimed as damages in both the complaint and the counterclaim did not exceed \$15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. The respondent filed an answering statement and the complainant filed a statement in reply. The complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Pemberton Produce, Inc., is a corporation with an address at P.O. Box 5361, Salinas, California. At the time of the transactions in issue in this proceeding complainant was licensed under the Act.

2. Respondent, Tom Lange Company, Inc., is a corporation with an address at 97 Produce Row, St. Louis, Missouri. At the time of the transactions involved in this proceeding respondent was licensed under the Act.

3. On January 16, 1982, complainant sold to respondent 900 cartons of lettuce at \$12.00 per carton plus \$.65 per carton for cooling, f.o.b., for a total contract price of \$12,144.00. Complainant shipped the truck load of lettuce to St. Louis, Missouri, where it arrived on or about

January 19, 1982. It received a restricted federal inspection which showed in pertinent part as follows:

<u>Products Inspected:</u>	Iceberg type LETTUCE in cartons printed "Sun Rich Produce of U.S.A. Ernie Strahn & Sons Inc. Holtville, Calif." and marked "2½ dozen hds." Applicant states manifested as 960 cartons.
<u>Condition of Load:</u>	Through load, lengthwise and crosswise and on end, 5 rows, 6 layers.
<u>Condition of Pack:</u>	Tight; place pack.
<u>Temperature of Product:</u>	Nearest rear doors-top 38°F., bottom 39°F.
<u>Quality:</u>	Clean, mostly fairly well trimmed and green color, average 86% hard and firm, 14% fairly firm. Grade defects from 6 to 12 heads per carton average 26% consisting of poorly trimmed (8 to 12 wrapper leaves).
<u>Condition:</u>	Heads or portion of heads not affected by condition defects are fresh and crisp. Wrapper leaves only: No decay. Head leaves: Average 4% damage by Tipburn. From 3 to 6 heads per carton average 16% damage by discolored papery crown leaves. Average 2% decay.
<u>Grade:</u>	Fails to grade U.S. No. 1 account of grade defects.
<u>Remarks:</u>	Inspection and certificate restricted to all layers of 1st stack nearest rear doors and top layer of next 4 stack.

4. Respondent rejected the load of lettuce discussed in paragraph 3, above, on the grounds complainant breached its warranty of suitable shipping condition because the lettuce was not U.S. No. 1 on arrival. Complainant resold the load of lettuce to La Mantia Brothers Arrigo Co., Inc., Chicago, Illinois, and received an accounting under which the purchaser paid complainant \$4,488.00. From this complainant deducted \$2,280.00 in freight which it was required to pay, leaving a net receipt with respect to the load of lettuce of \$2,008.00.

5. On January 18, 1982, complainant sold to respondent 850 cartons of lettuce at \$15.00 per carton plus \$.65 per carton for cooling, f.o.b., for a total contract price of \$13,802.50. On January 18, 1982, the load of lettuce was shipped from California to St. Louis, Missouri, where it arrived on or about January 21, 1982. The truckload was subjected to a restricted federal inspection which showed as follows:

<u>Products Inspected:</u>	Iceberg type LETTUCE in cartons printed "Fat-soo, 2 doz. Pemberton Produce Co. Salinas, Ca." Applicant states 850 cartons.
<u>Condition of Load:</u>	Through load, lengthwise 5 rows, 8 layers.

Condition of Pack: Tight in layers. Net Weight from 35½ to 40½ average 36.20 pounds per carton. Average tare of cartons 3 pounds.

Quality: Clean, mostly fairly well trimmed and head leaves good green color. Average 85% hard or firm, 15% fairly firm. Grade defects 5 to 10 heads to carton, average 30% poorly trimmed heads (8 to 11 wrapper leaves).

Condition: Heads or portions of heads not affected by condition defects are fresh and crisp. Wrapper leaves only: Average 3% decay. Head leaves: No decay.

Grade: Fails to grade U.S. No. 1 account of grade defects.

Remarks: Complainant states assigned file No. 4008. Weight determined at the request of the applicant. Inspection and certificate restricted to all layers of last three stacks nearest rear door of trailer.

6. Respondent rejected the load of lettuce referred to in paragraph 5, above on the grounds the cartons of lettuce did not weigh enough. Complainant resold the truckload to Joseph & Rayhill Produce, Inc., Louisville, Kentucky. Joseph & Rayhill Produce submitted an accounting to complainant, and a check in the amount of \$9,997.00 for the lettuce.

7. During the middle of January 1982, lettuce was in short supply in California as a result of a freeze which had occurred in the lettuce growing regions of that state. At that time Pemberton Produce was selling lettuce subject to conditions. With respect to both loads of lettuce sold to respondent which are at issue in this proceeding there were two conditions which complainant imposed with respect to the sales. First, its invoices showed that it was selling the lettuce subject to the condition that "WEIGHT NO FACTOR" would apply. This meant it would not guarantee the net weight of the lettuce. Second, its invoices showed that it was selling the lettuce subject to the condition that "DUE TO WIDE FREEZE DAMAGE GOOD DELIVERY APPLIES TO THIS SALE EXCEPT FOR BLISTERING OR PEELING OR RUSTY BROWN DISCOLORATION." This was complainant's usual course of business during the month of January 1982, resulting from an excess of demand for lettuce relative to its supply as a result of the freeze which occurred in California.

8. A formal complaint was filed on August 3, 1982, which was with nine months of the time the causes of action herein arose.

DISCUSSION

This proceeding involves a dispute between the complainant and respondent as to whether, with respect to two transactions involving the

2. Entering into or continuing in any arrangement or agreement with any other dealer, market agency or packer under which anyone is to refrain from bidding on livestock;

3. Failing to conduct his livestock buying operations independently of and in competition with other dealers, market agencies or packers; and

4. Entering into or continuing in any arrangement or agreement with any other dealer, market agency or packer to combine or "pool" their livestock purchases.

Respondent Leon Farrow is suspended as a registrant under the Act for a period of forty-five (45) days.

Respondent Knoke Livestock Buyers, Inc., its officers, directors, agents, employees, successors and assigns, and respondent Thomas Lenz, directly or indirectly through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Engaging in any course of business for the purpose or with the effect of controlling prices in connection with the purchase of livestock;

2. Entering into or continuing in any arrangement or agreement with any other dealer, market agency or packer under which anyone is to refrain from bidding on livestock;

3. Failing to conduct their livestock buying operations independently of and in competition with other dealers, market agencies or packers; and

4. Entering into or continuing in any arrangement or agreement with any other dealer, market agency or packer to combine or "pool" their livestock purchases.

Respondent Knoke Livestock Buyers, Inc., is suspended as a registrant under the Act for a period of forty-five (45) days.

The cease and desist provisions of this order shall become effective on the day after service of this order. The suspension provisions of this order shall become effective on the 30th day after service of this order; *Provided*, however, that if by any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made by complainant that it is not likely that such an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

APPENDIX

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).
[Excerpt omitted.-Ed.]

(No. 22,884)

In re: ROBERT E. MCKELVEY and ALLEN L. MAHIN. P&S Docket No. 6111. Decided September 23, 1983.

Packer—Insufficient funds checks—Failing to pay, when due—Failing to pay for meat—Civil penalty—Consent.

Peter V. Train, for complainant.

Donald H. Molstad, Sioux City, Iowa, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AS TO ALLEN L. MAHIN

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent willfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondent Allen L. Mahin admits the jurisdictional allegations in paragraph I of the complaint as they pertain to him and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondents Robert E. McKelvey and Allen L. Mahin are partners doing business as Crofton Meats. Their business mailing address is P.O. Box 135, Crofton, Nebraska.
2. Respondent Allen L. Mahin was at all times material herein:
 - (a) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat and meat food products for sale or shipment in commerce; and
 - (b) A packer within the meaning of and subject to the provisions of the Act.

CONCLUSIONS

The respondent Allen L. Mahin having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Allen L. Mahin, individually, as a partner with any other person, or through any corporate or other device, in connection with his operations as a packer subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock or meat without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay for meat.

In accordance with section 203(b) of the Act (7 U.S.C. §193(b)), respondent Allen L. Mahin is assessed a civil penalty in the amount of one hundred twenty-five dollars (\$125.00).

This order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon respondents.

Copies of this decision shall be served upon the parties.

(No. 22,885)

In re: K-M COMPANY, INC., and EDWARD L. KOCH. P&S Docket No. 6175. Decided September 23, 1983.

Packer—Insufficient funds checks—Failing to pay, when due—Civil penalty—Consent.

Barbara S. Harris, for complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a complaint and notice of hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*).

This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondents admit the jurisdictional allegations in paragraph I of the complaint and notice of hearing and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. (a) K-M Company, Inc. d/b/a French City Meats, hereinafter referred to as the corporate respondent, is a Kentucky corporation whose business mailing address is P. O. Box 299, Gallipolis, Ohio 45631.

(b) Corporate respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter, and of manufacturing or preparing meat or meat food products for sale of shipment in commerce; and

(2) A packer, within the meaning of and subject to the provisions of the Act.

2. (a) Edward L. Koch, hereinafter referred to as the individual respondent, is an individual whose business mailing address is P. O. Box 299, Gallipolis, Ohio 45631.

(b) The individual respondent is, and at all times material herein was:

(1) President of the corporate respondent;

(2) Owner of shares of the outstanding stock of the corporate respondent; and

(3) Responsible for the direction, management and control of the corporate respondent.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

The corporate respondent, its officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, and the individual respondent, directly or through any corporate or other device, in connection with their operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented; and

2. Failing to pay, when due, the full purchase price of livestock.

In accordance with section 203(b) of the Act (7 U.S.C. §198(b)), respondents are jointly and severally assessed a civil penalty of One Thousand Dollars (\$1,000.00).

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,886)

In re: ROBERT L. WIRTH. P&S Docket No. 6095. Decided June 16, 1983.

Dealer—Market agency—Registration requirement—Bonding requirement—Insufficient funds checks—Failure to pay, when due—Default.

Barbara S. Harris, for complainant.

Respondent, *pro se*.

Decision by John G. Liebert, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY
REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent has wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*).

Copies of the complaint and the Rules of Practice (7 C.F.R. §1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint

which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

FINDINGS OF FACT

1. (a) Robert L. Wirth, hereinafter referred to as respondent, is an individual whose mailing address is 2306 Messener Road, Wooster, Ohio 44691.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of a dealer buying and selling livestock in commerce and a market agency buying livestock in commerce on a commission basis; and

(2) Not registered with the Secretary of Agriculture.

2. During the period of June 9, 1982, through June 22, 1982, respondent engaged in the business of a dealer, buying and selling livestock in commerce, without filing and maintaining and adequate bond or its equivalent as required under the Act and the regulations.

3. Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph III of the complaint, and in numerous other transactions, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds available in the account upon which such checks were drawn to pay such checks when presented for payment.

4. (a) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraphs III and IV(a) of the complaint, and in numerous other transactions, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of November 4, 1982, there remained unpaid by the respondent a total of \$22,540.76 for the livestock transactions set forth in paragraph III and IV(a) of the complaint.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. §213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. §§201.29, 201.30).

By reason of the facts found in Findings of Fact 3 and 4 herein,

respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§213(a), 228b).

ORDER

Respondent, his agents and employees, individually or through any corporate or other device, in connection with his operations subject to the Act, shall cease and desist from:

1. Engaging in business in any capacity for which registration and bonding are required under the Packers and Stockyards Act without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;
2. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds available in the bank account upon which such checks are drawn to pay such checks when presented;
3. Failing to pay, when due, the full purchase price of livestock; and
4. Failing to pay the full purchase price of livestock.

This Order shall be effective from the sixth day after the Decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this Decision becomes final without further proceedings 35 days after service hereof UNLESS appealed to the Secretary by a party hereto within 30 days after service, as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. §1.130 *et seq.*).

[This decision and order became final July 21, 1983.-Ed.]

(No. 22,887)

In re: ANDY THATCHER. P&S Docket No. 6171. Decided September 29, 1983.

Dealer—Market agency—Bonding requirement—Suspension of registration—Civil penalty—Consent.

Peter V. Train, for complainant.
Respondent, pro se.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act

(7 U.S.C. §181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Andy Thatcher, hereinafter referred to as the respondent, is an individual whose mailing address is P. O. Box 44, Provo, Utah 84601.
2. Respondent is, and at all times material herein was:
 - (a) Engaged in the business of buying and selling livestock in commerce for his own account; and
 - (b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency to buy livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Andy Thatcher, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and regulations.

When respondent demonstrates that he is in full compliance with such requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. §213(b)), respondent is assessed a civil penalty in the amount of Five Hundred Dollars (\$500.00).

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,888)

In re: HENRY TAYLOR and H. D. CONNELL d/b/a HEADLAND LIVESTOCK AUCTION. P&S Docket No. 6144. Decided October 3, 1983.

Dealer—Market agency—Trust account—Insufficient funds checks—Failing to pay, when due—Suspension of registration—Consent.

Roberta Swartzendruber, for complainant.
Respondent, *pro se*.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondents admit the jurisdictional allegations in paragraph I of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(1) Henry Taylor and H.D. Connell, a partnership d/b/a Headland Livestock Auction, hereinafter referred to as respondents, had their

principal place of business in Headland, Alabama. Henry Taylor's present mailing address is 1206 Fairlane Drive, Dothan, Alabama 36301 and H.D. Connell's present mailing address is P.O. Box 565, Chattahoochee, Florida 32324.

(2) Respondents at all times material herein were:

(a) Engaged in the business of conducting and operating the Headland Stockyards, Inc., stockyard, Headland, Alabama, a posted stockyard under the Act;

(b) Engaged in the business of selling livestock on a commission basis at the stockyard and buying and selling livestock in commerce for their own account, and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce for their own account.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents, their agents and employees, directly or through any corporate or other device, in connection with their business subject to the Packers and Stockyards Act, shall cease and desist from:

(1) Failing to establish and maintain a separate bank account designated as a trust account for proceeds receivable from the sales of consigned livestock;

(2) Issuing checks to owners or consignors of livestock in payment of the net proceeds due from the sale of their livestock without having sufficient funds available in the account upon which they are drawn to pay such checks when presented;

(3) Failing to remit to the owners or consignors of livestock, when due, the net proceeds derived from the sale of their livestock;

(4) Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented for payment;

(5) Failing to pay, when due, for livestock.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in their business subject to the Act including a cash receipts and disbursement journal, complete check registers, a market support account, separate livestock dealer records and separate market agency records, a purchase

and sales journal, load make sheets with supporting accounts of sale and bill out invoices.

The respondents are suspended as registrants under the Act for a period of 21 days.

The provisions of this Order shall become effective on the sixth day after service of this Order on the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,889)

In re: CHIPPEWA MEATS, INC. P&S Docket No. 6185. Decided October 4, 1983.

Packer—Failing to pay, when due—Consent.

Eric Paul, for complainant.

Respondent, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 1.181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act. This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Chippewa Meats, Inc., hereinafter referred to as the respondent, is and at all times material herein was an Ohio corporation with its principal place of business located in Chippewa Lake, Ohio, and a mailing address of P.O. Box 7, Chippewa Lake, Ohio 44215.

2. The respondent is and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce for

the purpose of slaughter and of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning and subject to the provisions of the Act.

CONCLUSIONS

Respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this Decision, such Decision will be entered.

ORDER

Chippewa Meats, Inc., its officers, directors, agents, successors and assigns, directly or through any corporate or other device, in connection with any business or operation as a packer, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and
2. Failing to pay the full purchase price of livestock.

This order shall become effective on the first day after service of the order on the respondent.

Copies hereof shall be served on the parties.

(No. 22,890)

re: RICHARD BALDWIN and MYRTLE A. BALDWIN, P&S Docket No. 110. Decided October 6, 1983.

Dealer—Market agency—Insufficient funds checks—Failing to pay, when due—Suspension of registration—Consent.

Jory M. Hochberg, for complainant.

William J. Tway, Boise, Idaho, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION WITH RESPECT TO RICHARD BALDWIN

This proceeding was instituted under the Packers and Stockyards Act (U.S.C. §181 *et seq.*), hereinafter the Act, by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §38).

Respondent Richard Baldwin admits the jurisdictional allegations in paragraph I of the complaint as those allegations pertain to him, and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Richard Baldwin, hereinafter referred to as respondent Richard Baldwin, is an individual whose address is 2209 Caldwell Blvd., Nampa, Idaho 83651.
2. Respondent Richard Baldwin is, and at all times material herein was:
 - (a) Engaged in the business of buying and selling livestock in commerce for his own account, doing business as YL Cattle Company; and
 - (b) Registered with the Secretary of Agriculture as a dealer, buying and selling livestock in commerce, and as a market agency, buying livestock in commerce on a commission basis.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Richard Baldwin, his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock without having sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented; and
2. Failing to pay, when due, the full purchase price of livestock purchased.

Respondent Richard Baldwin is suspended as a registrant under the Act for a period of sixty (60) days.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,891)

In re: RICHARD BALDWIN and MYRTLE A. BALDWIN. P&S Docket No. 6110. Decided October 6, 1983.

Dealer—Insufficient funds checks—Failure to pay, when due—Ordered not to engage in business for a period of time—Consent.

Jory M. Hochberg, for complainant.

William J. Tway, Boise, Idaho, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION WITH RESPECT TO MYRTLE A. BALDWIN

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*), hereinafter the Act, by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

Respondent Myrtle A. Baldwin admits that at all times material herein, she was engaged in buying and selling livestock in commerce for her own account and was a dealer subject to the Act, and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Myrtle A. Baldwin, hereinafter referred to as respondent Myrtle Baldwin, is an individual whose address is 10601 Horseshoe Bend Road, Boise, Idaho 83703.

2. Respondent Myrtle Baldwin, at all times material herein was:

(a) Engaged in the business of buying and selling livestock in commerce for her own account; and

(b) A dealer, buying and selling livestock in commerce, within the meaning and subject to the provisions of the Act.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Myrtle Baldwin, her agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

1. Issuing checks in payment for livestock without having sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented; and
2. Failing to pay, when due, the full purchase price of livestock purchased.

Respondent Myrtle Baldwin shall not engage in business as a dealer or market agency for a period of sixty (60) days.

The provisions of this order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,892)

In re: CHARLEY M. FANNING and KENNETH L. FANNING. P&S Docket No. 6126. Decided August 23, 1983.

Dealer—Insolvency—Insufficient funds checks—Failure to pay, when due—Suspension of registration—Default.

Barbara S. Harris, for complainant.
Respondents, *pro se*.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY
REASON OF DEFAULT

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and regulations promulgated thereunder (9 C.F.R. §201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. §1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk by certified mail. Respondents were

informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

FINDINGS OF FACT

1. (a) Charley M. Fanning and Kenneth L. Fanning, hereinafter referred to as the respondents, are partners doing business as F & F Livestock. Their business mailing address is Route 1, Box 36, Norway, South Carolina 29113.

(b) Respondents, at all times material herein, were:

(1) Engaged in the business of buying and selling livestock in commerce for their own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

2. (a) As of February 1, 1983, the respondents' current liabilities exceeded their current assets. As of that date, the respondents had current liabilities totalling \$46,015.50 and current assets totalling \$500.00, resulting in an excess of current liabilities over current assets of \$45,515.50.

(b) The respondents' current liabilities presently exceed their current assets.

3. (a) Respondents, in connection with their operations as a dealer, on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondents did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) Respondents, in connection with their operations as a dealer, on or about the dates and in the transactions set forth in paragraph III(a) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of March 3, 1983, there remained unpaid by respondents a total of \$17,555.50 for such livestock purchases.

CONCLUSIONS

By reason of the facts found in Finding of Fact 2 herein, respondents' financial condition does not meet the requirements of the Act (7 U.S.C. §204).

By reason of the facts found in Finding of Fact 3 herein, respondents have wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§213(a), 28b).

ORDER

Respondents Charley M. Fanning and Kenneth L. Fanning, directly or indirectly, individually or through any corporate or other device, in connection with respondents' activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchases without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented for payment;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

The respondents are suspended as registrants under the Act for a period of sixty (60) days and thereafter until they demonstrate that they are no longer insolvent. When the respondents demonstrate that they are no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after the sixty (60) day period.

The provisions of this order shall become effective on the sixth day after this Decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this Decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. §1.130 *et seq.*).

[This decision and order became final October 1, 1983.-Ed.]

(No. 22,893)

re: CENTRAL MISSISSIPPI LIVESTOCK EXCHANGE, INC. and MILUS HESLEY HENDRY. P&S Docket No. 6188. Decided October 13, 1983.

Plaintiff—Market agency—Custodial account—Insufficient funds checks—Failure to pay, when due—Suspension of registration—Consent.

C. V. Train, for complainant.

Bert A. Byrd, Biloxi, Mississippi, for respondent.

Decision by William J. Weber, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondents admit the jurisdictional allegations in paragraphs I and II of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Central Mississippi Livestock Exchange, Inc., hereinafter referred to as the corporate respondent, is a corporation whose mailing address is P.O. Box 712, Bay Springs, Mississippi 39422.

2. The corporate respondent was, at all times material herein:

(a) Engaged in the business of conducting and operating the Central Mississippi Livestock Exchange, Inc., stockyard, a posted stockyard subject to the provisions of the Act, hereinafter referred to as the stockyard;

(b) Engaged in the business of buying and selling livestock on a commission basis at the stockyard, and buying and selling livestock in commerce for its own account; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock in commerce on a commission basis, and as a dealer to buy and sell livestock in commerce for its own account.

3. Milus Wesley Hendry, hereinafter referred to as the individual respondent, is an individual whose business mailing address is P.O. Box 712, Bay Springs, Mississippi 39422.

4. The individual respondent was, at all times material herein:

(a) President of the corporate respondent;

(b) Owner, in conjunction with members of his family, of all the stock issued by the corporate respondent; and

(c) Responsible for the direction, management and control of the corporate respondent.

5. The individual respondent was, at all times material herein, a market agency and dealer within the meaning of those terms as defined in the Act, and subject to the provisions of the Act.

CONCLUSIONS

Respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Central Mississippi Livestock Exchange, Inc., its officers, directors, agents and employees, and respondent Milus Wesley Hendry, his agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to deposit in their custodial accounts for shippers' proceeds, within the times prescribed by section 201.42 of the regulations (9 C.F.R. §201.42), an amount equal to the proceeds receivable from the purchase by respondents and others of livestock consigned to the corporate respondent for sale on a commission basis;

2. Failing to otherwise maintain their custodial accounts for shippers' proceeds in strict conformity with the provisions of section 201.42 of the regulations (9 C.F.R. §201.42);

3. Issuing checks in payment of the net proceeds resulting from the sale of livestock on a commission basis without having sufficient funds on deposit and available in the accounts upon which such checks are drawn to pay such checks when presented;

4. Failing to transmit to the owners, shippers or consignors of livestock, when due, the net proceeds due from the sale of their livestock; and

5. Purchasing livestock and failing to pay, when due, the full purchase price of such livestock.

The corporate respondent is suspended as a registrant under the Act for a period of nine months and thereafter until it demonstrates that the deficit in its custodial accounts for shippers' proceeds has been eliminated. When the corporate respondent demonstrates that the deficit in its custodial accounts for shippers' proceeds has been eliminated, a supplemental order will be issued in this proceeding terminating this suspension, after the expiration of the nine month period.

Respondent Milus Wesley Hendry shall not engage in business as a market agency or dealer for a period of nine months from the effective date of this order.

The provisions of this order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

(No. 22,894)

In re: MIGUEL A. MACHADO and G.L. "BUD" COZZI. P&S Docket No. 5943. Decided October 20, 1983.

Dealer—Market agency—Unfair and deceptive practice—Cease and desist order—Civil penalty.

An order buyer has a duty to disclose to his principal that he has a financial interest in cattle used to fill the principal's order because of the conflict of interest. Failure to disclose this conflict of interest is a well established unfair and deceptive practice in violation of the Act. Unlawful conduct of an agent is imputed to the principal under the laws of agency which are expressly set forth in the Act. Respondent Cozzi, a stockyard owner, and respondent Machado, an order buyer, entered into a partnership or joint venture, with each being the agent of the other, in the purchase and sale of cattle. Respondent Machado repurchased some of the "partnership" cattle sold through respondent Cozzi's stockyards to fill orders for Imperial Cattle Co., without advising Imperial of his financial interest in the cattle. Respondent Cozzi aided and abetted respondent Machado's fraud because he failed to prevent the fraud against Imperial, in light of the information available to him and his sharing of the profits of the fraud. Respondents renewed request for an order of production for *in camera* examination of any *Jencks Act* or *Brady doctrine* materials that might be contained in complainants investigation report is denied for the reasons set forth in the Decision and Remand Order as to Respondent Cozzi issued in this proceeding on June 24, 1983. See 42 A.D. 820.

Thomas C. Heinz, for complainant.

Daniel W. Olsen, Kansas City, Missouri, for respondent.

Victor W. Palmer, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER AS TO RESPONDENT COZZI

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*).¹ Respondent Machado, without admitting or denying the allegations of the complaint, consented to a cease and desist and record keeping order, and an order suspending his registration for 30 days. Subsequently, an oral hearing was held with respect to respondent Cozzi.

¹See generally Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, Agricultural Law, ch. 3 (1981 and Aug. 1983 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, Agricultural Law, ch. 71 (1980).

On December 30, 1982, Administrative Law Judge Victor W. Palmer filed an initial decision dismissing the complaint against respondent Cozzi because complainant refused to comply with his rulings that it make an investigation report available for *in camera* examination. Under Judge Palmer's rulings, he would have turned over to respondent Cozzi any portions of the investigation report he determined to be producible under the Jencks Act, the *Brady* doctrine, or Department policy, with complainant having no opportunity to elect not to comply with a production order, and to appeal, at the appropriate time, from his determination as to what material is producible.

On May 9, 1983, the Judicial Officer² reversed Judge Palmer's initial decision and remanded the proceeding for the preparation of an initial decision, without any adverse inference to be drawn because of complainant's refusal to submit the investigation report pursuant to Judge Palmer's rulings.

On August 16, 1983, Judge Palmer issued a second initial decision, holding that respondent Cozzi had engaged in an "unfair" practice in violation of the Act, and ordered respondent to "cease and desist from failing to reveal on bills of sale, invoices, and other documents it issues as a registrant under the Packers and Stockyards Act of 1921, that it is paying a commission or sharing profits or losses on livestock being sold with the agent of the principals purchasing the livestock from respondent."

Complainant, seeking a \$5,000 civil penalty in addition to the cease and desist order, appealed to the Judicial Officer on September 21, 1983.³ The Judicial Officer has been delegated final administrative authority to decide the Department's cases subject to 5 U.S.C. §§556 and 557 (7 C.F.R. §2.35).

Respondent filed a cross-appeal on October 14, 1983, in his response

²The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

³The appeal was due to be filed two days earlier, September 19, 1983, but, in accordance with the practice of this Department, it is accepted late since it was filed before 35 days after service of the initial decision, when it would have become final. *In re Shatkin*, 34 Agric. Dec. 296, 315 (1975); and see *In re Burton*, 40 Agric. Dec. 1534 (order vacating notice of effective date and permitting late appeal), *final decision*, 40 Agric. Dec. 1788 (1981) (decision as to LeRoy Franks), *rev'd on other grounds*, 638 F.2d 280 (8th Cir. 1982).

to complainant's appeal, which is permitted by the Department's rules of practice. 7 C.F.R. §1.145(b); *In re Thornton*, 41 Agric. Dec. 870, 900-12 (1982), *aff'd*, No. 82-7187 (11th Cir. Sept. 26, 1983); *In re Rowland*, 40 Agric. Dec. 1934, 1952-53 (1981), *aff'd*, No. 82-3015 (6th Cir. July 13, 1983); *In re Blades*, 40 Agric. Dec. 1725, 1725-26 (1981) (decision as to Leroy Franks), *rev'd on other grounds*, 638 F.2d 280 (8th Cir. 1982); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1558 (1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1210 n. 3 (1979) (remand order), *final decision*, 40 Agric. Dec. 736 (1981); *In re Wall*, 38 Agric. Dec. 1437, 1438 n. 2 (1979), *rev'd*, No. 79-3714 (6th Cir. July 10, 1981) (unpublished decision, not to be cited as precedent), *printed in* 40 Agric. Dec. 927 (1981). The case was referred to the Judicial Officer for decision on October 18, 1983.

For the reasons set forth below, I agree with complainant that respondent Cozzi should be assessed a \$5,000 civil penalty, in addition to the cease and desist order.

The findings of fact below are taken verbatim from Judge Palmer's findings of fact, except for the addition of the material included within brackets.

FINDINGS OF FACT

1. Miguel A. Machado, hereinafter referred to as respondent Machado, is an individual who at all times material herein was:

(a) Engaged in the business of buying and selling livestock for his own account or the account of others and buying livestock on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

2. (a) G.L. "Bud" Cozzi, hereinafter referred to as respondent Cozzi, is an individual d/b/a Turlock Livestock Auction Yard, with a mailing address at P.O. Box 524, Turlock, California 95380.

(b) Respondent Cozzi is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock on a commission basis and buying and selling livestock for his own account; and

(2) Registered with the Secretary of Agriculture as a market agency buying and selling on a commission basis and as a dealer buying and selling livestock for his own account.

3. During the period March through September 1979, Miguel A. Machado purchased approximately 700 head of cattle on behalf of respon-

dent G. L. "Bud" Cozzi at various auction markets. Respondent Cozzi paid for and took title to the cattle.⁴ They were all consigned and resold at Turlock Livestock Auction Market.

4. Respondent Cozzi had a verbal agreement with Miguel A. Machado that Cozzi would pay Machado 50 percent of the net profits and that Machado would assume 50 percent of any net losses upon resale of the cattle by Cozzi.

5. Miguel A. Machado purchased approximately 105 head of the cattle [referred to in Finding 3] from respondent [Cozzi] at auctions conducted at the Turlock Livestock Auction Market during the period March through September 1979, for the account of the Imperial Cattle Company, which paid Machado \$2.00 per head commission.

In the bills of sale and other documents issued by respondent Cozzi, there was nothing to indicate to Machado's principal, Imperial Cattle Company, that Machado was sharing in Cozzi's profits in addition to the commissions Machado was receiving from Imperial. [The profits on the approximately 105 head of cattle totalled about \$5,200, which was shared equally by respondents Cozzi and Machado, *i.e.*, about \$2,600 each.]

[6. Respondent Machado's order from Imperial Cattle Company was a standing order to buy cattle that would yield choice grade meat. The order was not limited as to the number of cattle to be bought. Each week Imperial Cattle Company gave respondent Machado an indication of the maximum price he was to pay, within a dollar and a half per hundredweight. Imperial Cattle Company expected respondent Machado to transfer his purchase weights and prices to Imperial, and to buy at the lowest possible price. Imperial Cattle Company did not know that respondent Machado had a financial interest in the cattle other than his \$2 per head commission, and would not have used respondent Machado as its agent if it had known of Machado's financial interest in the livestock. (Tr. 45-48)]

[7. On some occasions, respondent Machado purchased cattle at various auction markets, and sent some directly to Imperial Cattle Company, and some to Turlock Livestock Auction Market, which he repurchased a few days later for Imperial. Examples of this practice are as follows (CX 1a; CX 3, at 20; CX 4, at 30):

[The findings that Machado's purchases were "on behalf of respondent G.L. 'Bud' Cozzi," and that respondent Cozzi "took title to the cattle" are based on respondent Cozzi's uncontradicted testimony, but they do not necessarily reflect the legal effect of the relationship between respondents Cozzi and Machado referred to in Finding 4.]

Original Purchase Date	Original Purchase Market	Number Sent Directly to Imperial	Number Repurchased at Turlock for Imperial	Repurchase Date
8/24/79	Shasta	31	2	8/28/79
8/25/79	Roseville	10	11	8/28/79
8/31/79	Shasta	46	2	9/1/79
7/14/79	Oakdale	48	2	7/17/79

[8. Respondent Cozzi knew that respondent Machado was buying cattle at the Turlock Livestock Auction Market to fill various orders. During the livestock auctions, respondent Cozzi and his employees would not know the identity of the principals for whom respondent Machado was purchasing, since respondent Machado bought under various numbers, *e.g.*, "Mig 1," "Mig 22," "Mig 50." After each auction sale, respondent Machado would tell respondent Cozzi's office employees where the livestock were going that were bought under each number. (Tr. 92-97; and see Tr. 88)]

CONCLUSIONS

Respondent Machado had a duty to disclose to Imperial Cattle Company that he had a financial interest in the cattle used to fill the Imperial order because of his conflict of interest. As an order buyer for Imperial, his duty was to purchase the cattle at the lowest possible price. As a person with a financial interest in the cattle, his interest was to have the cattle purchased at the highest possible price. Failure to disclose this conflict of interest is a well established unfair and deceptive practice in violation of §312(a) of the Packers and Stockyards Act (7 U.S.C. §213(a)) and the applicable regulations (9 C.F.R. §201.44). *In re Vealey*, 39 Agric. Dec. 8, 10-13 (1979); *In re Livestock Marketing Development Co.*, 33 Agric. Dec. 784, 798-800, 807-08 (1974).

The regulations issued under the Act expressly require an order buyer to fully inform his principal of the "names of the persons from whom purchased" and the "true nature of the transaction." 9 C.F.R. §201.44. Specifically, the regulations provide (*id.*):

§201.44 Market agencies to render prompt accounting for purchases on order.

Each market agency shall, promptly following the purchase of livestock on a commission or agency basis, *transmit or deliver to the person for whose account such purchase was made*, or the duly authorized agent, *a true written account of the purchase showing the number, weight, and price of each kind of animal purchased, the names of the persons from whom purchased*, the date of purchase, the commission and other

lawful charges, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction. (Emphasis added.)⁶

Respondent Cozzi concedes that respondent Machado engaged in an unfair and deceptive practice in violation of §312(a) of the Act (7 U.S.C. §213(a)) by failing to disclose to his principal, Imperial Cattle Company, his financial interest in the cattle he purchased for Imperial. But respondent Cozzi contends that he (Cozzi) did not engage in any unfair or deceptive practice in violation of the Act with respect to these transactions. Respondent Cozzi testified that he had no interest in what Mr. Machado did with the livestock on which they shared the profits and losses, stating (Tr. 93-94):

We had no knowledge of where the cattle were going [until after the sale (Tr. 93-97)], and whatever he [Mr. Machado] did was on his own with the next outfit or company that he worked with. When they came through our ring, that was the end of the line between him and I. The cattle were mine. If he could buy them, fine; if he couldn't he let them go, and the next man bought them.

Because, as far as I'm concerned, they're his [Mr. Machado's] cattle after they went through the ring, and he bought them, and that's up to him. It's an entirely different deal.

However, respondent Cozzi engaged in an unfair and deceptive practice with respect to the Machado-Imperial transactions under two separate concepts, (i) agency and (ii) aiding and abetting.

First, as to the agency concept, respondents Machado and Cozzi were partners or joint venturers with respect to the cattle involved here, with each being the agent of the other and responsible for the actions of the other within the scope of the joint venture. The Packers and Stockyards Act has the familiar provisions making the act of an agent within the scope of his office the act of the principal as well as that of the agent. Specifically, §403 of the Act provides (7 U.S.C. §223):

§223. Responsibility of principal for act or omission of agent

When construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer or any live poultry dealer or handler, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every

⁶Prior to August 2, 1979, §201.44 of the regulations also applied to live poultry licensees, as to live poultry. 19 Fed. Reg. 4528 (1954).

case also be deemed the act, omission, or failure of such packer or any live poultry dealer or handler, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

Congress wisely made principals responsible for the violations of their agents within the scope of their agency. Otherwise, principals could hide behind the acts of their agents, and the remedial purposes of the Act would not be achieved.

The relationship between respondents Machado and Cozzi manifested the indicia of a partnership where one partner contributes capital and the other contributes services. "A partnership is a contract of two or more competent persons, to place their money, effects, labor, and skill in lawful commerce or business, and to divide the profit and bear the loss, in certain proportions." 68 C.J.S. *Partnership* §1. Respondent Machado purchased livestock with funds supplied by respondent Cozzi. Profits and losses resulting from repurchase for Imperial Cattle Company were shared equally between respondents Cozzi and Machado. Expenses were charged against the proceeds of the partnership.

Although respondents did not reduce their agreement to a formal, written contract, and they may not even have intended to create a partnership, they nevertheless entered into a relationship with all the hallmarks of a partnership. "[T]he contract of a partnership may be oral or written, express or implied from the conduct of the parties." 68 C.J.S. *Partnership* §4. "[A] partnership may be created without any definite intention to create it." 68 C.J.S. *Partnership* §10.

Under §7(4) of the Uniform Partnership Act, "the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business," with exceptions not relevant here. Crane and Bromberg, *Law of Partnership* §14A (Hornbook Series 1968).

"The law of agency ordinarily controls in respect of partnership matters, and each partner is regarded as a principal for himself and as an agent for the firm and for his copartners in respect of partnership matters." 68 C.J.S. *Partnership* §136. As shown above, the Packers and Stockyards Act expressly makes the principal and agent both responsible for the acts of the agent.

Even if the relationship between respondents Cozzi and Machado had not been a partnership, as a matter of law, it would at least have constituted a joint venture, with the attendant joint responsibilities. As stated in 48A C.J.S. *Joint Ventures* §5:

It has been stated that a joint venture resembles a partnership in that its members associate together as coowners of a business enterprise, agreeing to share profits and losses.

The relation of the parties to a joint venture is so similar to

that in a partnership that their rights, duties, and liabilities are usually tested by partnership rules. . . .

A joint venture is generally a looser form of organization than a partnership. . . .

"One member of a joint venture or enterprise is generally liable for the acts of another. Such liability is a vicarious one founded on the voluntary relationship that has arisen between the parties wholly ex contractu." 48A C.J.S. *Joint Ventures* §63.

As a partner or joint venturer with respondent Machado, respondent Cozzi shared jointly in the duty to disclose respondent Machado's financial interest in the cattle to Imperial Cattle Company. As mutual agents for each other, the act of one is vicariously imputed to the other.

Respondent Cozzi argues that the principal-agency relationship between he and respondent Machado ended when respondent Machado bought the cattle. "Once that was done, the agency of Machado was completed" (Response to Appeal Petition, at 2). However, the agency relationship did not end at that point. The agreement between respondents was not merely to buy cattle and hold them. The agreement was to buy cattle and sell them immediately, with a split of the profits or losses based on the resale price. Hence the resale was just as much a part of the partnership business as the original purchase.

A resale at the highest possible price was in furtherance of the partnership enterprise. When respondent Machado bid higher than any other person present at the auction for "partnership" cattle, to fill Imperial's order, respondent Machado was acting within the scope of the Cozzi-Machado partnership or joint venture.

Accordingly, respondent Machado's fraud in connection with the purchases for Imperial is imputed to respondent Cozzi under the laws of agency, which are expressly set forth in the Act.

Respondent Cozzi's liability for the failure to disclose may also rest on his position as a person who aided and abetted, and profited from, the violation of the Act by respondent Machado. The cattle were run through respondent Cozzi's market, and respondent Cozzi issued invoices which did not disclose either his or respondent Machado's financial interest, thereby facilitating and contributing to the belief by Imperial that respondent Machado's sole interest in the cattle was the order buyer commissions he received. Respondent Machado would not have been able to purchase these cattle twice and thereby reap both a speculative profit and an order-buying commission without the use of respondent Cozzi's market as a conduit to "launder" the transactions.

Respondent Cozzi knew that respondent Machado was purchasing cattle at Turlock to fill orders for a number of principals. In view of the large numbers of cattle consigned for resale at Turlock in which both respondents had a financial interest, respondent Cozzi had to know that at least some portion of such cattle were being used by respondent Machado to fill orders. In addition, respondent Cozzi is charged with the knowledge of his bookkeeper, who learned after each sale that a portion of the cattle in which respondents Cozzi and Machado had a joint financial interest were bought by respondent Machado for Imperial Cattle Company.

These facts, including respondent Cozzi's sharing of the profits from the cattle bought for Imperial, placed a duty on respondent Cozzi to issue an accounting which fully disclosed respondent Machado's financial interest in the cattle. Respondent Cozzi had sufficient information to know that the transactions had all the earmarks of fraud being committed on Imperial Cattle Company. Particularly since respondent Cozzi was sharing in the profits of any fraud being perpetrated against Imperial, he was obligated (in the light of his knowledge) to ensure that his market was not being used to "launder" fraudulent cattle transactions.⁶

Respondent Cozzi's failure to prevent the fraud on Imperial, in the light of the information available to him and his sharing of the profits of the fraud, was an unfair and deceptive practice that was a key part of the fraudulent transactions. Complainant's request for a \$5,000 civil penalty is very modest, considering the fact that the violations alleged in the complaint occurred on 10 different dates and involved substantial amounts of money. The Act authorizes a \$10,000 civil penalty for each violation. 7 U.S.C. §213(b). Respondent Cozzi has made no contention that he is unable to pay a \$5,000 civil penalty without an effect on his ability to continue in business.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

⁶Whether respondent Cozzi would have been obligated to notify Imperial Cattle Company of respondent Machado's financial interest in the cattle (on the invoices or by direct notification), under the same circumstances involved here, except that respondent Cozzi did not share in the profits of the transactions, need not be decided here.

the Department's sanction policy is set forth at great
various decisions, e.g., *In re Worstley*, 33 Agric. Dec. 1547,
set forth in the Appendix to this decision.⁷ The Depart-
ment's policy is also discussed at length in *In re Esposito*, 38
3, 624-65 (1979).

did not impose a monetary penalty in this case because
at complainant's interpretation of the Act "is a new one
a change in agency policy" (Initial Decision, at 7). How-
ever, does not represent a change in agency policy. Rather,
standing agency policy to a new factual setting.

Respondent Cozzi was sharing in the speculative profits (but
losses) from the cattle purchased by respondent Machado
in the factual setting involved here reeks with fraud, and
Cozzi was aware of sufficient facts to know or suspect
what was occurring, a monetary penalty should be assessed
against Cozzi.

renews his request for an order of production of any
Brady materials, or for an adverse inference to be drawn
against complainant because of complainant's refusal to produce such
a *camera* inspection by Judge Palmer. This request is
for reasons set forth in the Decision and Remand Order as
Cozzi issued in this proceeding on June 24, 1983. As
Decision (slip op. at 65), "complainant's refusal to furnish

as issued pursuant to this policy were sustained, e.g., in *In re Collier*,
971-72 (1979), *aff'd*, 624 F.2d 100 (9th Cir. 1980); *In re Gold Bell I&S*,
37 Agric. Dec. 1936, 1362-63 (1978), *aff'd*, No. 78-3184 (D. N.J. May
11, 1980), 614 F.2d 770 (3d Cir. 1980); *In re Muchenthaler*, 87 Agric. Dec.
aff'd mem., 500 F.2d 840 (8th Cir. 1978); *In re Mid-States Livestock*,
547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.
In re Cordelio Livestock Co., 30 Agric. Dec. 1114, 1189-94 (1977), *aff'd*,
547, 549-51 (5th Cir. 1978); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 151,
cert. curiam, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S.
cert. coram, 35 Agric. Dec. 20, 31-32 (1976), *aff'd*, No. 76-1618 (9th Cir. N.
36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. D.
aff'd, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*,
O., 702 (1976), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*,
In re Southwest Produce, Inc., 34 Agric. Dec. 160, 171, 178, *aff'd*,
77 (5th Cir. 1976); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 15
aff'd mem., 524 F.2d 977 (5th Cir. 1976); *In re Marvin Tragash Co.*,
1013-14 (1974), *aff'd*, 524 F.2d 1265 (5th Cir. 1975); *In re Tre*
Agric. Dec. 490, 515, 639-50 (1974), *aff'd mem.*, 510 F.2d 966 (4th
38 Agric. Dec. 58, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089

the investigation report under Judge Palmer's rulings does not give rise to an inference that there is evidence favorable to respondent in the investigation report since complainant was understandably concerned with establishing a damaging and erroneous precedent in this case." However, if the circumstances warranted the drawing of an adverse inference against the Government, *e.g.*, because of its failure to call a witness, the inference would be drawn. See, *e.g.*, *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976).

ORDER

Respondent Cozzi, his employees and agents, directly or indirectly or through any corporate or other device, shall cease and desist from entering into any arrangement, agreement or understanding with anyone by which livestock in which he has an ownership interest are used to fill purchase orders without full, timely disclosure of all relevant information including true ownership of the livestock and all other information necessary to show fully the true nature of the transactions to the principles of the purchase orders.

Respondent Cozzi is assessed a civil penalty of \$5,000, payable not later than the 60th day after service of this Order, to be paid by certified or bank check made payable to the Treasury of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446-South, United States Department of Agriculture, Washington, D.C. 20250.

The cease and desist provisions of this Order shall become effective on the day after service of this Order.

APPENDIX

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). U.S.D.A. Sanction Policy. [Excerpt omitted.-Ed.]

(No. 22,895)

In re: BLUEGRASS PACKING CO, CLYDE VON BERGEN, and MELTON A. NEALE P&S Docket No. 6000. Decided September 12, 1983.

Packer—Effect of bankruptcy on administrative disciplinary proceeding—Failure to pay, when due—Insufficient funds checks—Trust fund obligations—Civil penalty.

Respondent Neale's argument regarding any effect a bankruptcy proceeding would have on an administrative disciplinary proceeding is meritless. In light of statutory provisions

of the Bankruptcy code and the Packers and Stockyards Act and cases previously decided by the courts it is quite clear that administrative proceedings brought under the P&S Act are exempt from the Bankruptcy Court's power to stay proceedings.

Respondent's arguments concerning their lack of knowledge or control or direction of the events constituting the violations are meritless.

Respondents were ordered to cease and desist from: failing to pay and failing to pay, when due, the full purchase price of livestock; issuing insufficient funds checks in payment for livestock; and dissipating trust fund assets required to be held for the pro rata payment to cash sellers of livestock. Respondents were assessed a civil penalty of \$6,000.

Thomas C. Heinz, for complainant.

Eugene F. LaPorte, Mt. Prospect, Illinois, for respondent Von Bergen.

Allan C. Levine, Chicago, Illinois, for respondent Neale.

Decision by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

This is an administrative disciplinary proceeding based on the Packers and Stockyards Act (7 USC 181 *et seq.*; "Act").

The Administrator of the Packers and Stockyards Administration filed a Complaint on March 30, 1982 against Respondent Bluegrass Packing Co., a corporation, and Clyde Von Bergen, its President, and Melton A. Neale, its Vice President.

Respondents were charged with violations of the Act for issuing checks which were dishonored when presented for payment for livestock purchased by Respondents.

In addition, Respondents allegedly failed to hold in trust certain assets for the benefit of "all unpaid cash sellers of . . . livestock until full payment has been received by such unpaid sellers . . ." 7 USC 196(b).

The Complaint alleges that Respondents failed to timely pay the full purchase price of livestock by reason of the dishonoring or Respondents' checks to the extent of \$29,775.25.

Respondent Bluegrass Packing Co. failed to file an Answer and is in default (7 CFR 1.136(c)).

Respondents Von Bergen and Neale filed Appearances and separate Answers admitting the identificational and occupational allegations, but denying that the respondent corporation was in fact managed or controlled by them and denied knowledge of the particular checks alleged, and denied any violations of the Act. Both Respondents also deny violation of the statutory trust obligations.

Respondent Neale affirmatively alleges that his bankruptcy proceeding discharges any obligation that he might personally have.

Complainant filed a Motion on October 29, 1982 to set the matter for

hearing. Trial of the issues was scheduled to begin on January 25, 1983 in Chicago, Illinois and on request rescheduled to March 8, 1983.

At the time of trial, Respondents admitted the factual allegations of the Complaint, objected to the proffered exhibits, and agreed to submit the issues of knowledge, and mitigation in briefs. Respondent Neale also argued the relationship and impact of the bankruptcy proceedings on this administrative disciplinary proceeding.

Complainant, Packers and Stockyards Administration, was represented by Thomas C. Heinz, Esquire, of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C.

Respondent Clyde Von Bergen was represented by Eugene F. LaPorte, Esquire, Mount Prospect, Illinois.

Respondent Melton A. Neale was represented by Allan G. Levine, Esquire, Chicago, Illinois.

No one appeared on behalf of the corporate Respondent Bluegrass Packing Co.

The last brief was filed June 27, 1983.¹

FINDINGS OF FACT

1. (a) Bluegrass Packing Co., hereinafter referred to as the corporate respondent, is a corporation with a mailing address at P.O. Box 103, Danville, Kentucky 40422.

(b) The corporate respondent was, at all times material herein:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(2) A packer within the meaning of and subject to the provisions of the Act.

(c) The corporate respondent's average annual purchases of livestock have exceeded \$500,000.00.

2. (a) Clyde Von Bergen, hereinafter referred to as Respondent Von Bergen, is an individual with an address at 1503 Ironwood Drive, Mt. Prospect, Illinois 60056.

(b) Respondent Von Bergen was, at all times material herein:

(1) President of the corporate respondent;

(2) An owner of corporate stock issued by the corporate respondent; and

(3) A manager, director and controller of the corporate respondent.

¹Complainant's Reply, filed July 5, 1983, requests that Respondent Von Bergen's brief, which was not timely filed, not be considered. That request is denied.

(c) Melton A. Neale, hereinafter referred to as Respondent Neale, is an individual with an address at 1833 B Wildberry Drive, Glenview, Illinois 60025.²

(d) Respondent Neale was, at all times material herein:

- (1) Vice President of the corporate respondent;
- (2) An owner of corporate stock issued by the corporate respondent;
- (3) A manager, director and controller of the corporate respondent.

3. The corporate respondent, under the direction, management and control of Respondent Von Bergen and Respondent Neale, in connection with its operations as a packer, on or about the dates and in the transactions set forth below, and at divers other times, issued checks in purported payment for livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have sufficient funds available in the account upon which such checks were drawn to pay such checks when presented.

<u>DATE</u>	<u>NO.</u> <u>HEAD</u>	<u>SELLER</u>	<u>CHECK AMOUNT</u>
7/27/81	110	Kenneth Ryan Elizabethtown, Kentucky	\$10,975.25
7/27/81	145	Earl Bauman Hebron, Illinois	10,000.00
7/29/81	55	Paul Levine Youngstown, Ohio	2,800.00
7/31/81	48	Paul Levine Youngstown, Ohio	<u>6,500.00</u>
		Total	\$29,775.25

4. (a) The corporate respondent, under the direction, management and control of Respondent Von Bergen and Respondent Neale, in con-

² This record does not identify Respondent Melton A. Neale here as the same person as "Mel Neale" who was a respondent in *In re Meatxcorp and Mel Neale*, 40 AD 341 (1981), with a business and personal address at 899 Skokie Blvd., Northbrook, Illinois.

A cease and desist Order was issued in *Meatxcorp and Mel Neale* to bar the issuance of checks without sufficient funds for payment for livestock, and failing to timely and fully pay for livestock purchased.

Complainant's request that "official notice be taken" of that reported decision, first made in Complainant's Reply Brief (filed 6/24/83), is noted, but this record does not support a conclusion that it is the same person involved in both cases.

Complainant's further argument for a "heavy penalty" for a repeat violation falls.

nection with its operations as a packer, in the transactions set forth in paragraph 3 and in divers other transactions, purchased livestock for purposes of slaughter and failed to pay, when due, the full purchase price of such livestock.

(b) As of October 8, 1981, there remained unpaid by the corporate respondent at least \$29,775.25 for such livestock purchases.

(c) A \$20,000.00 trust fund agreement plus interest held in the name of the corporate respondent has been paid out on a pro rata basis to the three individuals identified in paragraph 3, leaving \$9,063.72 unpaid for such livestock purchases.

5. The corporate respondent, under the direction, management and control of Respondent Von Bergen and Respondent Neale, wilfully failed after actual notice of statutory requirements on September 1 and 9, 1981, to hold in trust for the benefit of the unpaid cash sellers of livestock listed in paragraph 3 above all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived from livestock purchased by the corporate respondent from cash sellers of livestock.

* * * * *

Since the corporate respondent has defaulted and the individual respondents have stipulated to the facts alleged in the Complaint, the issues are:

—whether the facts, as admitted, constitute violations of the Packers and Stockyards Act;

—whether an administrative disciplinary proceeding is subordinated to a bankruptcy proceeding;

—and what sanction is warranted and appropriate.

It is well established that the admitted facts constitute violations of the Act. Issuing checks without sufficient funds in payment for livestock purchased, and failure to timely and fully pay for livestock violates sections 202(a) and 409(a) of the Act (7 U.S.C. §§192(a), 228b).³ *In re Thomaston Beef and Veal*, 39 AD 171 (1980); *In re R&D Investments*, 35 AD 668 (1976). Failure to comply with the statutory trust provisions violates sections 202(a) and 206 of the Act (7 U.S.C. §§192(a), 196). *In re Norwich Veal & Beef*, 38 AD 214 (1978), 37 AD 896, 1202 (1977).

Respondent Neale's claims regarding the effect of bankruptcy laws and procedures are wholly meritless. Section 362(b)(4) of the Bankruptcy

³ Complainant alleges and argues violation of §409(a) of the Act and cites it in error as 7 USC 228(a) when it is actually 7 USC 228b. This error was probably typographical and did not confuse or mislead anyone.

Code (11 U.S.C. §362(b)(4)) provides that “[t]he filing of a petition under sections 301, 302 or 303 of this title does not operate as a stay . . . of the commencement or continuation of a proceeding by a governmental unit to enforce such government unit's police or regulatory power.”

The instant administrative proceeding does not involve a dispute between private parties. It is a disciplinary proceeding initiated by the Packers and Stockyards Administration before the Secretary of Agriculture to ensure compliance with the regulatory scheme established by the Packers and Stockyards Act. It is a proceeding by a governmental unit to enforce its regulatory power.

The Packers and Stockyards Act grants to the Secretary pervasive jurisdiction over the livestock marketing and meat packing industries. The overall goal of the Act is the free and unburdened flow of livestock and meat products in commerce from producer to consumer. *Stafford v. Wallace*, 258 U.S. 495, 514–15 (1922). In order to achieve this goal, Congress gave the Secretary of Agriculture two broad and complementary mandates—the authority to assure both fair trade practices as well as financial responsibility throughout the regulated industries.

In 1976, Congress amended the Packers and Stockyards Act to increase the financial protection afforded producers under the Act. The bonding provisions of the statute were extended to packers with average annual purchases of over \$500,000.00 (7 USC §204), and such packers were required to hold all livestock, meats and receivables or proceeds derived therefrom in trust until all producers who have not expressly extended credit to the packer have received full payment for their livestock (7 USC §196).

The amendments also authorized the Secretary to require an insolvent packer to cease purchasing livestock or to cease such purchasing except under prescribed conditions (7 USC §204), and made a part of the statute the well-established rule that a packer's failure to pay promptly for livestock is an unfair trade practice (7 USC §228b).

In light of these statutory provisions and the Congressional purposes they are designed to achieve, it is clear that the instant administrative proceeding is brought in the public interest to enforce the Secretary's police and regulatory authority and thus falls squarely within the exempting phrase of section 362(b)(4) of the Bankruptcy Code (11 USC §362(b)(4)).

Numerous courts have held that section 362 of the Bankruptcy Code precludes the stay of governmental actions involving fraud, environmental protection, consumer protection, and other similar regulatory matters. *Missouri v. United States Bankruptcy Court*, 647 F.2d 768 (8th Cir. 1981), citing H. R. Rep. No. 595, 95th Cong., 1st Sess. 367

(1977), reprinted 1978 U. S. Code Cong. & Ad. News 5963, 6323; *In re Spaulding Dodge*, 5 Bankr. 481 (N. D. Ill. Ed. 1980); *Matter of Canarico Quarries, Inc.*, 466 F. Supp 1333 (D. Puerto Rico 1979).

Although there have been no court cases specifically dealing with the applicability of this section to cases initiated under the Packers and Stockyards Act, two cases brought under the Bankruptcy Act of 1898 have held that administrative proceedings initiated under the Packers and Stockyards Act were not stayed by the automatic stay provisions of that Act. *In re R&D Investments, Inc.*, BK-77-1226, BK-77-1281 (Unpublished Memorandum and Order, a copy of which is attached to Complainant's Opening Brief); *In re Northern Boneless Meat Corp.*, 9 Bankr. 27 (S.D.N.Y., February 5, 1981). In *Northern Boneless Meat Corp.*, the District Court, affirming the holding of the Bankruptcy Court that §314 and Rule 11-44 did not confer authority to stay the administrative proceeding brought against Northern Boneless Meat Corp., went on to state:

It is also worth mentioning that Judge Lifland's reading of the old Bankruptcy Act apparently leads to a result which is consistent with that mandated by Congress in the new Bankruptcy Code. See 11 USC §362(b)(4) (automatic stay provision does not apply to action by government agency to enforce the agency's police or regulatory power). fn 5

See, also, *Marvin Tragash Co. v. United States Department of Agriculture*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v Freeman*, 373 F.2d 110 (2nd Cir. 1967).

It is quite clear from the cases decided under the automatic stay provisions of both the Bankruptcy Act and the new Bankruptcy Code that administrative cases brought under the Packers and Stockyards Act are exempt from the Bankruptcy Court's power to stay proceedings.

In addition, the USDA Judicial Officer has spoken on the matter.

Respondents request a stay of this proceeding pending a determination of the individual respondents' right to a discharge in a pending bankruptcy proceeding, but such a stay is neither required nor in the public interest. Under the revised Bankruptcy Act, a bankruptcy petition does not operate to stay the commencement of continuation of a proceeding by a governmental unit to enforce its policy or regulatory powers, including a proceeding to assess a civil penalty. 11 USC §362(b)(4) and (5); H. Rep. No. 95-595, 95th Cong., 1st Sess. (1977) 342-43; Sen. Rep. No. 95-989, 95th Cong., 2nd Sess. (1978) 51-52. See also, 11 USC §525.

In addition, claims for any civil penalty under the Packers

and Stockyards Act would not be paid until after the claims of the bankrupts' creditors (except for interest from the date of the filing of the petition). 11 USC §726. And a discharge in bankruptcy would not discharge such civil penalty. 11 USC §523(a)(7).

Accordingly, there is no basis for failing to carry out the remedial purposes of the Packers and Stockyards Act because of the individual respondents' bankruptcy proceeding. *In re Pastures*, 39 AD 395, 397-398 (1980).

In short, this proceeding may lawfully continue, a cease and desist order may issue for violation of the Packers and Stockyards Act, and a civil penalty may be imposed for those violations without running afoul of bankruptcy laws and procedures.

Both individual Respondents raise arguments concerning their lack of knowledge of the particular checks which were issued without sufficient funds and their lack of control or direction of the events constituting the violations.

Neither argument has merit. Both were senior officers of the respondent corporation and had responsibility by reason of those offices for oversight of all of its operations and activities. They knew, or should have known, of the financial conditions. The argument (by Respondent Von Bergen) that he was merely an "employee" who took "orders" is vacuous.

In any event, both agreed to the Complaint allegations that, in effect, they were in actual charge of the corporate operations which were carried out under their "direction, control and management." Complaint paragraph II. In addition, both agreed that they "wilfully failed after actual notice of statutory requirements" to comply with the law. Complaint paragraph V. Transcript pages 15 and 21.

There is nothing in this record other than argument to suggest that the individual respondents were not fully effective and responsible for the normal duties of the offices that they held in the corporation.

There are no mitigating circumstances shown or established.

* * * * *

By reason of the facts in paragraphs 3 and 4, Respondents have violated sections 202(a) and 409(a) of the Act (7 USC §§192(a), 228b).

By reason of the facts in paragraph 5, Respondents have wilfully violated sections 202(a) and 206 of the Act (7 USC §§192(a), 196).

* * * * *

Complainant asks for a cease and desist order as well as a \$12,000.00 civil penalty against Respondents, jointly and severally.

There is no rationale, argument or other support for the requested civil penalty.

Respondents are in violation for having issued checks without sufficient funds, failure to promptly and fully pay for livestock purchased and violation of the statutory trust obligations to preserve assets for "the benefit of all unpaid cash sellers" of livestock to the respondent corporation. The total amounted to \$29,975.25, but by reason of subsequent distribution of funds from a trust fund agreement held in the name of corporate respondent \$20,000.00 plus interest was paid out on a pro rata basis to the sellers identified in the Complaint, reducing the \$29,775.25 to a net outstanding figure of \$9,063.72. Transcript page 11.

The record does not show that this is a second violation of this nature for Respondent Melton A. Neale.

In *Thomas Beef and Veal, supra*, at page 173, the Judicial Officer said:

"Under the Act, it is necessary to consider the size of respondents' business and the effect of the penalty on respondents' ability to continue in business (7 U.S.C. 198(b)). However, there is no basis for believing that respondents are unable to pay a \$4,000 civil penalty. The statement in respondents' appeal stating that 'the levy of a fine at this time will make it impossible for respondent to pay its suppliers' is unsubstantiated. Moreover, the individual respondents are also liable for the penalty, and there is no showing that they are unable to pay the civil penalty."

In *Thomaston Beef*, the unpaid total amounted to \$9,063.00 for livestock purchased in commerce.

A civil penalty of \$6,000.00 shall be assessed against the three Respondents jointly and severally.

ORDER

Bluegrass Packing Co., its officers, directors, agents, successors and assigns, directly or through any corporate or other device, and Clyde Von Bergen and Melton A. Neale, in connection with any business or operation as a packer, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;
2. Failing to pay the full purchase price of livestock;
3. Issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented; and
4. Dissipating trust fund assets or otherwise expending funds received in payment for meat, meat food products or livestock products

derived from livestock purchased in cash sales for any purpose other than the pro rata payment to cash sellers of livestock after receiving timely notification of failure to pay for livestock.

In accordance with section 203(b) of the Act (7 USC §193(b)), Respondents are assessed, jointly and severally, a civil penalty of \$6,000.00.

Payment of the civil penalty shall be by a certified check or money order payable to the Treasurer of the United States and forwarded to Complainant's counsel within ninety (90) days of the time this decision and order become final.

The cease and desist order shall be effective at the time the decision and order become final.

This decision and order will become final without further proceedings thirty-five (35) days after service, unless appealed to the Secretary within thirty (30) days after service (7 CFR 1.142 and 1.145).

{This decision and order became final October 20, 1983.—Ed.]

(No. 22,896)

In re: WHITESTOWN PACKING CORPORATION. P&S Docket No. 6084.
Decided October 21, 1983.

Packer—Bonding requirement—Civil penalty—Consent.

Allan R. Kahan, for complainant.

John Clapper, III, Rochester, New York, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondent wilfully violated the Act and the regulations issued thereunder (9 C.F.R. §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. §1.138).

The respondent admits the jurisdictional allegations in paragraph I of the Complaint and Notice of Hearing and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Whitestown Packing Corporation, hereinafter referred to as the respondent, is a corporation with its principal place of business located at Utica, New York. Respondent's mailing address is 1930 Oriskany Street-West, Utica, New York 13502.
2. Respondent is, and at all times material herein was:
 - (a) Engaged in the business of buying livestock in commerce for purposes of slaughter; and
 - (b) A packer within the meaning of that term as defined in the Act and subject to the provisions of the Act.
3. Respondent's average annual purchases of livestock exceed \$500,000.00.

CONCLUSIONS

The respondent having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Whitestown Packing Corporation, its officers, directors, agents, employes, successors and assigns, directly or through any corporate or other device, in connection with its operations as a packer subject to the Act, shall cease and desist from purchasing livestock for slaughter without filing and maintaining a reasonable bond or its equivalent, as required by the Act and regulations.

In accordance with section 203(b) of the Act (7 U.S.C. §193(b)), respondent is assessed a civil penalty of Five Hundred Dollars (\$500.00), payable by the effective date of this order.

Such order shall have the same force and effect as if entered after full hearing and shall be effective on the first day after service upon respondent.

Copies of this decision shall be served upon the parties.

(No. 22,897)

In re BENJAMIN L. HOWELL, JR., JOSEPH K. HOWELL, HOWELL SALES COMPANY, FARMVILLE LIVESTOCK MARKET, INC., and ORANGE LIVESTOCK MARKET, INC. P&S Docket No. 6091. Decided October 21, 1983.

Market agency—Custodial account—Misusing proceeds from sale of livestock—Insufficient funds checks—Failure to remit net proceeds, when due—Accounts and

records—Suspension of registration—Individual ordered not to operate subject to the Act—Consent.

Allan R. Kahan, for complainant.

Ronald W. Vaught, Hot Springs, Virginia, for respondents.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION REGARDING BENJAMIN L. HOWELL, JR., HOWELL SALES COMPANY AND FARMVILLE LIVESTOCK MARKET, INC.

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. §181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents willfully violated the Act and the regulations issued thereunder (9 CFR §201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the rules of practice applicable to this proceeding (7 CFR §1.138).

The respondents Benjamin L. Howell, Jr., Howell Sales Company and Farmville Livestock Market, Inc., admit the jurisdictional allegations in paragraph I of the Amended Complaint as then apply to them and specifically admit that the Secretary has jurisdiction in this matter and such additional facts which accurately reflects the situation as it exists today, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Howell Sales Company is a corporation organized and existing under the laws of the State of Virginia. Its mailing address is P.O. Drawer #1, Verona, Virginia 24482.

2. Respondent Howell Sales Company, at all times material to the allegations of this complaint, was:

(a) Engaged in the business of conducting and operating the Orange Livestock Market Stockyard at Orange, Virginia; the Blackstone Livestock Market stockyard at Blackstone, Virginia; and the Farmville Livestock Market stockyard at Farmville, Virginia, stockyards posted under and subject to the provisions of the Act;

(b) Engaged in the business of buying and selling livestock in commerce on a commission basis at these three stockyards; and

(c) Registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis in commerce.

3. Respondent Benjamin L. Howell, Jr., is an individual whose business mailing address is P.O. Drawer #1, Verona, Virginia 24482.

4. Respondent Benjamin Howell, at all times material to the allegations of this complaint, and until at least August, 1982, was the President and owner of approximately 50% of the stock of Howell Sales Company.

5. Respondent Joseph K. Howell, is an individual whose business mailing address is P.O. Box 226, Orange, Virginia 22960.

6. Respondent Joseph Howell, at times material to the allegations of this complaint, and until at least August, 1982, was the Vice-President and owner of approximately 50 percent of the stock of respondent Howell Sales Company.

7. Respondents Benjamin and Joseph Howell, at times material to the allegations of this complaint, managed and controlled the business operations of respondent Howell Sales Company. They established its policies and practices, including those acts and practices which constitute the violations of the Act and regulations alleged in this complaint.

8. Respondents Benjamin Howell and Joseph Howell at all times material herein were engaged in the business of buying and selling livestock on a commission basis in commerce and engaged in business as a market agency within the meaning of that term as defined in the Act and subject to the provisions of the Act.

9. During August, 1982, respondents Benjamin and Joseph Howell restructured their livestock operations, and, in connection with this restructuring, caused respondent Howell Sales Company to sell or transfer the Orange Livestock Market stockyard facility and market agency operations to a new corporate entity, Orange Livestock Market, Inc., and to sell or transfer the Farmville Livestock Market and Blackstone Livestock Market stockyards and market agency operations to an already existing corporate entity, Farmville Livestock, Inc., which is owned by the individual respondents and other members of their family. Since August, 1982, respondents Benjamin and Joseph Howell operating through these several corporate entities, have continued to carry on business as a market agency subject to the Act, buying and selling livestock in commerce. In May, 1983, respondents Benjamin Howell and Farmville Livestock Market, Inc. discontinued their operations at both the Farmville Livestock Market and Blackstone Livestock Market stockyards.

10. Respondent Farmville Livestock Market, Inc., is a corporation organized and existing under the laws of the State of Virginia. Its mailing address is P.O. Drawer #1, Verona, Virginia 24482.

11. Respondent Farmville Livestock Market, Inc., from approximately August, 1982, until May 25, 1983, was:

(a) Engaged in the business of buying and selling livestock in commerce on a commission basis at the Farmville Livestock Market Stock-

yard, located at Farmville, Virginia, and at the Blackstone Livestock Market stockyard, located at Blackstone, Virginia; and

(b) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis in commerce.

12. Respondent Farmville Livestock Market, Inc., is managed, directed and controlled by respondent Benjamin Howell.

CONCLUSIONS

The respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Benjamin L. Howell, Jr., individually or as an officer, director, agent or employee of respondent Howell Sales Company, Farmville Livestock Market, Inc., or Orange Livestock Market, Inc., directly or indirectly through any corporate or other device, and respondent Farmville Livestock Market, Inc., its officers, directors, agents or employees, directly or indirectly through any corporate or other device, in connection with its operations subject to the Act, shall cease and desist from:

1. Failing to deposit in their "Custodial Account for Shippers' Proceeds," within the time prescribed by section 201.42 of the regulations (9 CFR §201.42), an amount equal to the proceeds receivable from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of livestock on a commission basis for purposes of their own or for any purpose other than the payment of lawful marketing charges and the remittance of the net proceeds to the owners or consignors of such livestock;

3. Failing to otherwise maintain their "Custodial Account for Shippers' Proceeds" in strict conformity with the requirements of section 201.42 of the regulations (9 CFR §201.42);

4. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and

5. Failure to remit to the owners or consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock.

The order issued April 8, 1980, in P.&S. Docket No. 5651 against Howell Sales Company remains in effect and the provisions of that order are incorporated in and made a part of this Decision and Order.

In addition, Howell Sales Company, its officers, directors, agents or employees, directly or indirectly through any corporate or other device,

in connection with its business operations subject to the Act, shall cease and desist from:

1. Using funds received as proceeds from the sale of livestock on a commission basis for purposes of its own or for any purpose other than the payment of lawful marketing charges and the remittance of the net proceeds to the shippers, owners or consignors of such livestock;
2. Issuing checks in payment of the net proceeds resulting from the sale of consigned livestock without maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented; and
3. Failing to remit to the owners or consignors of livestock, when due, the net proceeds resulting from the sale of consigned livestock.

The order issued May 17, 1979, in P.&S. Docket No. 5488 against Farmville Livestock Market, Inc., Joseph K. Howell and Benjamin L. Howell, Jr., remains in effect, and the provisions of that order are incorporated in and made a part of this Decision and Order.

Respondents shall keep and maintain accounts, records and memoranda which fully and correctly disclose all transactions involved in their business operations subject to the Act, including invoices and accounts of sale which show the true and correct names of the consignors of livestock.

Respondents Howell Sales Company and Farmville Livestock Market, Inc., are suspended as registrants under the Act for a period of six (6) months and thereafter until each respondent demonstrates that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated. When each respondent demonstrates that the deficit in its "Custodial Account for Shippers' Proceeds" has been eliminated, a supplemental order will be issued in this proceeding terminating the suspension as to that respondent, after the expiration of the six (6) month period.

Respondent Benjamin L. Howell, Jr., shall not operate in any capacity subject to the Act for a period of one (1) year from the effective date of this order.

The provisions of this Order shall become effective on the sixth day after service upon the respondents.

Copies of this Decision shall be served upon the parties.

[Refer to 39 A.D. 651 and 38 A.D. 973.-Ed.]

(No. 22,898)

In re: JAMES T. THOMPSON, DONALD E. HANCOCK, ALVINA HANCOCK, and TERRY DIRKS. P&S Docket No. 6112. Decided October 24, 83.

Dealer—False or deceptive pretenses—Fraud or deceit—Misrepresentation—Documents showing false weights or prices—Accounts and records—Suspension of registration—Consent.

Jory Hockberg, for complainant.

William B. Deas, Kansas City, Missouri, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION WITH RESPECT TO JAMES T. THOMPSON

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*) This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

Respondent James T. Thompson admits the jurisdictional allegations in paragraph IA of the Complaint and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(1) James T. Thompson, is an individual whose mailing address is 32 Valley Lane, Ontario, Oregon 97914.

(2) Respondent Thompson is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to purchase livestock in commerce for purposes of slaughter.

CONCLUSIONS

Respondent Thompson having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondent Thompson, his agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

(1) Engaging in any act, practice or course of business for the purpose of obtaining money from the purchasers of livestock by false or deceptive pretenses, or which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of livestock;

(2) Entering into, continuing in, or cooperating in any agreement, arrangement, understanding or course of business with any person for the purpose of aiding or assisting such person to obtain money from the purchasers of livestock by false or deceptive pretenses, or which enables such person to engage in a practice which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of livestock;

(3) Misrepresenting to his principals or to other purchasers of livestock or aiding and assisting any person to misrepresent to such person,

(a) The original purchase prices or the original purchase weights of livestock, or

(b) The true nature of charges made for his buying services;

(4) Preparing and issuing, or causing to be prepared and issued, in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, scale tickets or any other document showing false, inaccurate, or misleading weight or price entries for such livestock;

(5) Inserting or failing to insert in accounts of purchase, invoices, billings or any other document prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole or in part, in a false, inaccurate or misleading record of such livestock purchase or sale transaction; and

(6) Collecting payment from the purchasers of livestock, or aiding and assisting any person to collect from the purchasers of livestock, on the basis of false, inaccurate, or misleading accounts of purchase, invoices or billings.

Respondent Thompson shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in his business subject to the Packers and Stockyards Act, including accountings, invoices, billings and scale tickets which show the true and correct weights, prices, and shrinkage allowances of livestock.

Respondent Thompson is suspended as a registrant under the Act for a period of one hundred and eighty (180) days.

The provisions of this Order shall become effective on the sixth day after service of this order on the respondent.

Copies of this decision shall be served upon the parties.

(No. 22,899)

In re: JAMES T. THOMPSON, DONALD E. HANCOCK, ALVINA HANCOCK, and TERRY DIRKS. P&S Docket No. 6112. Decided October 24, 1983.

Dealer—Market agency—False or deceptive pretenses—Fraud or deceit—Misrepresentation—Documents showing false weights or prices—Accounts and records—Suspension of registration—Civil penalty—Consent.

Jory Hochberg, for complainant.

William B. Deas, Kansas City, Missouri, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION WITH RESPECT TO DONALD E. HANCOCK AND ALVINA HANCOCK

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. 181 *et seq.*) by a Complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the respondents wilfully violated the Act and the regulations issued thereunder (9 CFR 201.1 *et seq.*). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 CFR 1.138).

Respondents Donald E. Hancock and Alvina Hancock admit the jurisdictional allegations in paragraph IB of the Complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding and for such purpose only, to the entry of this decision.

The complainant agrees to the entry of this decision.

FINDINGS OF FACT

(1) Donald E. Hancock and Alvina Hancock are partners doing business as Don Hancock Livestock. Donald E. Hancock and Alvina Hancock, have a business mailing address of Box #8, Vale, Oregon 97918.

(2) Respondents Donald Hancock and Alvina Hancock are and at all times material herein were:

(a) Engaged in the business of buying and selling livestock in commerce for their own account and buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce and as a market agency to buy livestock on commission in commerce.

CONCLUSIONS

Respondents Donald E. Hancock and Alvina Hancock, having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

Respondents Donald E. Hancock and Alvina Hancock, their agents and employees, directly or indirectly through any corporate or other device, shall cease and desist from:

(1) Engaging in any act, practice or course of business for the purpose of obtaining money from the purchasers of livestock by false or deceptive pretenses, or which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of livestock;

(2) Entering into, continuing in, or cooperating in any agreement, arrangement, understanding or course of business with any person for the purpose of aiding or assisting such person to obtain money from the purchasers of livestock by false or deceptive pretenses, or which enables such person to engage in a practice which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of livestock;

(3) Misrepresenting to their principals or to other purchasers of livestock or aiding and assisting any person to misrepresent to such person,

(a) The original purchase prices or the original purchase weight of livestock, or

(b) The true nature of charges made for their buying services;

(4) Preparing and issuing, or causing to be prepared and issued in connection with the purchase or sale of livestock, accounts of purchase, invoices, billings, scale tickets or any other document showing false, inaccurate, or misleading weight or price entries for such livestock;

(5) Inserting or failing to insert in accounts of purchase, invoices, billings or any other document prepared in connection with the purchase or sale of livestock, any statement or information where such insertion or omission results, in whole or in part, in a false, inaccurate or misleading record of such livestock purchase or sale transaction; and

(6) Collecting payment from the purchasers of livestock, or aiding and assisting any person to collect from the purchasers of livestock, on the basis of false, inaccurate, or misleading accounts of purchase, invoices or billings.

Respondents Donald E. Hancock and Alvina Hancock shall keep and maintain accounts, records and memoranda which fully and correctly

disclose the true nature of all transactions involved in their business subject to the Packers and Stockyards Act, including accountings, invoices, billings and scale tickets which show the true and correct weights, prices, and shrinkage allowances of livestock.

Respondents Donald E. Hancock and Alvina Hancock are suspended as registrants under the Act for a period of one hundred and twenty (120) days.

In accordance with section 312(b) of the Act (7 U.S.C. 213(b)), respondents Donald E. Hancock and Alvina Hancock are jointly and severally assessed a civil penalty in the amount of three thousand, five hundred dollars (\$3,500.00).

The provisions of this Order shall become effective on the sixth day after service of this order on the respondents.

Copies of this decision shall be served upon the parties.

MISCELLANEOUS ORDERS

(No. 22,900)

In re: ANDY THATCHER. P&S Docket No. 6171. Order filed September 29, 1983.

Order issued by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

The parties have agreed to the entry of a consent decision which provides, in part, for a suspension of the respondent "as a registrant under the Act until he complies fully with the bonding requirements under the Act and Regulations." I have signed the consent decision and order on this date. Simultaneously with the filing of the consent decision, complainant filed a request for a supplemental order terminating the suspension because respondent has demonstrated that he is now in full compliance with the bonding requirements.

Therefore, IT IS HEREBY ORDERED that the suspension provision of the order is hereby terminated. The order shall remain in full force and effect in all other respects.

(No. 22,901)

In re: LEON FARROW, KNOKE LIVESTOCK BUYERS, INC. and THOMAS LENZ. P&S Docket No. 5893. Order issued October 17, 1983.

Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

The attorney for respondents has requested a stay of the Order issued herein pending an appeal to the United States Court of Appeals. The suspension order issued herein is hereby stayed pending the outcome of the appeal. The cease and desist provisions of the Order shall remain in effect.

REPARATION DECISIONS

(No. 22,902)

RAYMOND TALBOTT, JAMES TALBOTT, and ELENA TALBOTT d/b/a TALBOTT SHEEP COMPANY v. R.G. "INDIO" CALZADA. P&S Docket No. 5901. Order issued September 20, 1983.

Each party's version of dispute is credible but inconsistent with the other's version—Versions in direct conflict and irreconcilable—Party with burden of proof loses—Complaint dismissed.

Eric Paul, Presiding Officer.

Donald O. Germino, Los Banos, California, for complainants.

William M. Kerr, Midland, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*) begun by a complaint filed on July 11, 1980, alleging in substance failure to pay in full for livestock purchased and delivered. The amount claimed was \$4,991.95 balance due plus \$6,736.50 trucking expense, a total of \$11,728.45.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice, were served on respondent on March 1, 1981. A copy of the investigation report was served on complainant on or about the same date. Respondent timely filed an answer and request for oral hearing which was promptly served on complainant.

An oral hearing was held in Phoenix, Arizona on October 21, 1981, before Eric Paul of the Office of the General Counsel of this Department. Complainants were represented by Donald O. Germino, Esq., Los Banos, California. Respondent was represented by William Monroe Kerr, Esq., Midland, Texas. Complainant Raymond Talbott, respondent, and one witness testified. Four exhibits were received. Thereafter briefs were filed on behalf of complainants and respondent.

The following is undisputed. Prior to May 15, 1980, complainants had recently sold to respondent seven loads of sheep which were shipped from complainants' place of business in Los Banos, California, to a facility in Columbus, New Mexico, where respondent sold them to a Mexican importer. The price of the earlier sheep was 21 cents per pound. On or about May 15, complainant Raymond Talbott and respondent spoke by telephone about complainants' shipping two more loads of sheep

to Columbus. On or about May 20, 366 sheep departed from complainants' place of business for Columbus; the truck driver did not find respondent in Columbus, and continued on to respondent's place of business in Dryden, Texas, and delivered the sheep to respondent there. On or about May 22, 401 sheep departed from complainants' place of business and were taken directly to respondent's place of business and delivered to respondent there. Complainants prepared a bill (exhibit A to Talbott affidavit, investigation report) addressed to respondent charging 18½ cents per pound for the 366, and 19 cents per pound for the 401, for a total of \$18,011.95. Respondent paid complainants \$18,020.00.

About the average weight of the seven earlier loads, respondent testified (Tr. 122) that it was 140 pounds. Complainant Raymond Talbott testified (Tr. 26) to the following figures (except for the averages which we computed):

<u>Date</u>	<u>Number</u>	<u>Weight</u>	<u>Average Weight</u>
4/30	361	50,090	139
4/1	300	44,050	147
4/17	724	99,755	138

He also mentioned a group of 1,135 for which complainants were paid on May 9, but did not give their weight. About the average weight of the loads in dispute, respondent testified (Tr. 122) that it was 125 pounds. Complainants prepared a bill (exhibit A to Talbott affidavit, investigation report) showing the following figures (except for the averages which we computed):

<u>Number</u>	<u>Weight</u>	<u>Average Weight</u>
366	46,370	127
401	49,650	124
Totals: 767	96,020	125

Thus the sheep in dispute had a lower average weight than the earlier ones, and complainants charged a lower price per pound for them.

Respondent testified credibly that he did not see that bill (exhibit A to Talbott affidavit, investigation report) until after he had resold the sheep, he had sent the \$13,020.00 to complainants, and the dispute had arisen.

About that phone call between complainant Raymond Talbott and respondent before the sheep were shipped, Mr. Talbott testified that respondent said that he could use two more loads of sheep like the seven earlier loads, and could pay 19 cents a pound for them, and that he (Mr. Talbott) said that he would see what he could find at that price. Respondent testified that complainant Raymond Talbott said that he was "hung" with "the bottom end" of the herd or herds of sheep from which the seven earlier loads had come, and would have to send them to

respondent to see what he could do with them, that nothing was said about 19 cents per pound or any other price, and that he (respondent) told Mr. Talbott that "the freight was going to kill him," referring to the cost of shipping them, but he would do what he could for him. Each testified credibly. The testimony is in direct conflict and irreconcilable. So far as the record shows, each man's subsequent actions were consistent with his version of what was said in that phone call and inconsistent with the other's version.

Respondent testified credibly (Tr. 104-5) that he sold other sheep to the same Mexican importer after the events in dispute herein.

"[I]f the evidence is such that a decision on a point cannot be made one way or the other, the party with the burden of proof loses." *Texas Distrib. v. Local Union No. 100, etc.*, 598 F.2d 393, 402 (5 Cir., 1979). We accept respondent's version, of what was said before the sheep were shipped, on that basis.

Respondent testified credibly that he fed and cared for the sheep until May 27, then consigned them, plus 17 of his own to replace some that had died, for sale at auction in San Angelo, Texas. The investigation report includes a copy of an invoice for sheep sold for the account of respondent at San Angelo on that date, giving the following figures (except for the averages which we computed):

Number	Weight	Average Weight	Price Per cwt.
206	27,695	134	\$18.00
88	11,355	129	18.00
369	43,585	118	15.00
4	445	111	5.00
26	3,410	131	20.00
12	1,290	108	17.50
1	135	135	21.00
59	6,980	118	14.10
Total:	765	94,895	124

The net proceeds after expenses, including trucking of some of them, is shown as \$14,560.03. Dividing that by 765 and multiplying by 17 produces \$323.56 as the proceeds of sale of respondent's 17. Subtracting that from \$14,560.03 leaves \$14,236.47 as the net proceeds of complainants' surviving sheep. Subtracting \$13,020.00, the amount which respondent forwarded to complainants, leaves \$1,216.47 as the amount of proceeds of sale of complainants' sheep kept by respondent. We cannot find this to be an unreasonable compensation to respondent for care, feeding and handling of more than 750 sheep for several days.

When respondent consigned the sheep for sale at San Angelo, he did so in his own name. We attach no significance to this on the basis of his credible testimony that his reason for this was that he is a local regular

customer at that market and expected that it would give better service to him than to distant parties such as complainants.

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. §2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-405g. See also Reorganization Plan Number 2 of 1953, 5 U.S.C., 1976 ed., appendix page 764.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice, 9 C.F.R. §202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States v. ICC*, 337 U.S. 426.

The complaint is hereby dismissed.

Copies hereof shall be served on the parties.

(No. 22,903)

SIMPSON LEHMAN RANCH v. STIEFEL BROS. P&S Docket No. 6016
Order issued October 18, 1983.

Complaint not timely filed—Complaint dismissed.

John J. Casey, Presiding Officer.
Complainant and respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), begun by the filing of a complaint on January 21, 1982, alleging that on September 26, 1981, complainant sold to respondent livestock for a total of \$18,200.00 and received a check for that amount. It also alleged, "We have been unable to cash the check because of insufficient funds." The amount claimed was \$18,200.00.

Copies of the complaint and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding pursuant to the Rules of Practice were served on respondent on March 30, 1982. A copy of the investigation report was served on complainant on the same date.

At the time of service of the copies of the complaint and the investigation report, respondent was notified that an answer thereto should be filed within 20 days after such service and that failure to file an answer would be deemed an admission of the allegations contained in

the complaint, and that the case file would be forwarded to the Office of the Secretary for the issuance of the default order without oral hearing as provided in the Rules of Practice at 9 CFR §202.106(d). No answer was filed by respondent.

The failure of respondent to file an answer within the specified time limit is deemed to be an admission of all the allegations of the complaint and a consent to the issuance of a final order in the proceeding based on all evidence in the record including information contained in the investigation report.

On the basis of the record as thus formed, it is found that on September 26, 1981, respondent purchased livestock from complainant and gave a check in purported payment therefor in the amount of \$18,200.00. "[W]hen the check was received Mr. Lehman called Stiefel's bank and he was told by Stiefel's bank there were insufficient funds in the account. Then Mr. Lehman continued calling Stiefel's bank once a week at least and sometimes twice a week until the month of January." Thus complainant must have known shortly after September 26 that it had received a worthless check in payment for its livestock. However the complaint was not filed until January 21, 1982. Thus the complaint was not filed within the 90 day time limit provided in section 309 of the Act (7 U.S.C. 210).

This order is the same as an order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. §2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953 (5 U.S.C., 1976 ed., app. pg. 764).

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see rule 17 of the Rules of Practice, 9 C.F.R. §202.117.

On a complainant's right to judicial review of such an order, see 5 U.S.C. 702-3 and *United States v. ICC*, 387 U.S. 426.

The complaint herein is hereby dismissed.

Copies thereof shall be served on the parties.

DISCIPLINARY DECISIONS

(No. 22,904)

In re: FASANO/HARRISS PIE COMPANY. PACA Docket No. 2-6259. Decided July 25, 1983.

Failure to pay promptly—Publication of the facts—Default.

Edward M. Silverstein, for Complainant.
Respondent, *pro se*.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "PACA," instituted by a complaint filed on April 28, 1983, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1980 through March 1982, respondent purchased and accepted, in interstate and foreign commerce, from 12 sellers, 22 lots of mixed fruit, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof, in the total amount of \$350,517.96.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

FINDINGS OF FACT

1. Respondent, Fasano/Harriss Pie Company, is a Michigan Corporation, whose address is 350 Culver Street, Saugatuck, Michigan 49453.
2. Pursuant to the licensing provisions of the Act, license number 810898 was issued to Lloyd J. Harriss Pie Company on April 20, 1981. On November 30, 1981, respondent filed a Certificate of Amendment to the Articles of Incorporation of Lloyd J. Harriss Pie Company, with the Michigan Department of Commerce, Corporation & Securities Bureau.

Cite as 42 A.D. 1491

Corporation Division, showing that the corporation's name had been changed to Fasano/Harriss Pie Company by shareholders' action on November 25, 1981. Although the Regulations require it, 7 C.F.R. §46.13, the Department was never notified of this name change. The license issued to Lloyd J. Harriss Pie Company terminated on April 20, 1982, when respondent failed to renew it.

3. During the period December 1980 through March 1982, respondent acting prior to November 25, 1981, as Lloyd J. Harriss Pie Company, and thereafter as Fasano/Harriss Pie Company purchased and accepted in interstate and foreign commerce from 12 sellers, 22 lots of mixed fruit, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$350,517.96.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 22 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the PACA (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final September 6, 1983.—Ed.]

(No. 22,905)

In re: TRAVERSE CITY CANNING COMPANY. PACA Docket No. 2-6228.
Decided August 1, 1983.

Failure to pay promptly—Admission of the facts—Publication of the facts.

Edward M. Silverstein, for complainant.

Patrick J. Wilson, Traverse City, Michigan, for respondent

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.* hereinafter referred to as the "Act"), instituted by a complaint filed on March 16, 1983, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

It is alleged in the complaint that during the period May 1979 through December 1981, Respondent purchased from 79 sellers, and accepted in interstate commerce, 1,320 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$1,347,338.51. Complainant further alleged that such actions were willful, flagrant and/or repeated violations of section 2 of the Act, and requested that Respondent's license be revoked.

On May 11, 1983, Respondent filed an answer in which it denied paragraph 5 of the complaint which alleged and detailed the specific transactions of Respondent's failure to pay for produce, and further alleged that it "has been declared a bankrupt and that there exists various unpaid sellers, as more fully disclosed by the records of the Bankruptcy Court."

Complainant subsequently moved for a decision on the pleadings, accompanied by a memorandum of points and authorities and request for official notice of Debtor's Original Petition, which was attached to the request.

Respondent filed no response to the Complainant's motion and request.

The Debtor's Original Petition, including Schedule A-Statement of all Liabilities of Debtor (including Schedules A-1, A-2, and A-3) which was filed by Respondent in the United States Bankruptcy Court for the Western District of Michigan, is hereby officially noticed.

Review of Schedule A shows:

1. All 79 of the sellers listed in the complaint are listed on Schedule A as creditors of Respondent, primarily for "crops;"
2. As to 51 of the 79 sellers, the amount admitted as owed the sellers on the Schedule A is the same as the amount alleged owed the sellers in the complaint; and

3. Of the remaining 28 sellers, Respondent admits owing each of them more than the amount alleged as owed in the complaint. The total additional indebtedness Respondent admitted owing these produce shippers in Schedule A is \$589,444.43.

The Judicial Officer's "Ruling on Certified Questions," *In re: Produce Brokers, Inc.*, 41 AD 2247 (1982), which is controlling here, requires entry of a decision without a hearing when the admitted facts show that the holder of a PACA license has repeatedly failed to pay large sums to sellers of produce. Such facts are admitted here.¹ Complainant requests in the motion for decision, publication of a finding that Respondent committed willful, flagrant, and repeated violations of the Act. Such finding is consistent with the Judicial Officer's holdings, as in *Produce*.

Because Respondent is bankrupt and in view of the finding requested in Complainant's motion, no finding of willfulness is necessary and evidence to negate willfulness is irrelevant. In accordance with *Produce*, a finding is included in the order that Respondent committed flagrant and repeated violations of the Act.

FINDINGS OF FACT

1. Respondent, Traverse City Canning Company, is a Michigan Corporation whose address is Post Office Box 427, Traverse City, Michigan 49684.

2. Pursuant to the licensing provisions of the Act, license number 107699 was issued to Respondent on June 2, 1947. This license was renewed annually, and was next due for renewal on June 2, 1983.

3. The Secretary has jurisdiction in this proceeding.

4. As more fully set forth in paragraph 5 of the complaint, during the period May 1979 through December 1981, Respondent purchased from 79 sellers, and accepted, in interstate commerce, 1,320 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount \$1,347,333.51.

CONCLUSIONS

Respondent's failure to make full payment promptly, constitutes flagrant, and repeated violations of section 2(4) of the Act (7 U.S.C. 499b(4) for which the order below is issued.

¹ Respondent's statement in its answer that its debts "are fully disclosed by the records of the Bankruptcy Court," and its admissions of indebtedness in its Schedule A, establish the accuracy of the allegations of indebtedness in the complaint.

ORDER

A finding is made that Respondent, Traverse City Canning Company, has committed flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall become effective on the 11th day after this decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this decision will become final without further proceedings 35 days after service thereon unless appealed to the Secretary by a party to the proceedings within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final September 12, 1983.—Ed.]

(No. 22,906)

In re: CORONET FOODS, INC. PACA Docket No. 2-6254. Decided August 10, 1983.

Failure to pay promptly—Revocation of license—Default.

Edward M. Silverstein, for complainant.
Respondent, *pro se*.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "PACA," instituted by a complaint filed on April 14, 1983, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that, during the period October 1981 through April 1982, respondent purchased and accepted, in interstate and foreign commerce, from 5 sellers, 60 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of \$332,620.15.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and

upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Coronet Foods, Inc., is a corporation, whose last known address was 608 So. Mateo Street, Los Angeles, California 90021.

2. Pursuant to the licensing provisions of the PACA, license number 81128 was issued to respondent on June 17, 1981, was renewed annually, presently is in effect, and is next subject to renewal on or before June 17, 1983.

3. During the period October 1981 through April 1982, respondent purchased and accepted in interstate and foreign commerce from 5 sellers, 60 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$332,620.15.

4. On August 18, 1982, an involuntary petition in bankruptcy was filed against respondent pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. 701 *et seq.*) with the United States Bankruptcy Court for the Central District of California, which was assigned Case No. LA-82-18810-RO.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 60 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the PACA (7 U.S.C. 499b), for which the Order below is issued.

ORDER

Respondent's license is revoked.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings thirty five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final September 16, 1983.—Ed.]

(No. 22,907)

In re: DOCK CASE BROKERAGE COMPANY, and/or DOCKET CASE BROKERAGE CO., INC. PACA Docket Nos. 2-6215 and 2-6257. Decided August 19, 1983.

Failure to pay promptly—Publication of the facts—Application for license denied.

Respondent Dock Case Brokerage Company failed to make full payment for tomatoes purchased by his client in interstate and foreign commerce which constitutes repeated and flagrant violations of the Act. The application of respondent Dock Case Brokerage Co., Inc. was denied.

Edward M. Silverstein, for complainant.

Paul J. Martin, Immokalee, Florida, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This decision and order is applicable to two proceedings brought against the respondents under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*, hereinafter "the PACA"). The first proceeding was instituted by a complaint filed on February 17, 1983, which alleged that during March through May 1982, respondents repeatedly and flagrantly violated the PACA by failing to make full payment promptly of agreed purchase prices for 20 lots of tomatoes purchased in commerce from 3 sellers in the total amount of \$142,912.65. On April 15, 1983, respondent Dock Case Brokerage Co., Inc., applied for a license to do business under the PACA; giving rise to the second proceeding, filed on April 28, 1983, requiring respondent to show cause why the license should not be refused in light of respondents' alleged violations during March through May 1982.

Issue was joined and I ordered the two proceedings to be consolidated, and held oral hearing on them both on May 17, 1983, in Fort Myers, Florida. Complainant and respondents were represented by Edward M. Silverstein, Esq., and Paul J. Martin, Esq., respectively. Briefing was completed on August 10, 1983.

The record evidence shows that at the time of the hearing, respondent Dock Case Brokerage Company still owed over \$120,000 for 20 lots of fresh produce received and accepted in interstate and foreign commerce. Under controlling Departmental policy as established by the Judicial Officer and affirmed by the courts, orders are being entered publishing these facts and circumstances in respect to the respondent partnership, Dock Case Brokerage Company; and denying the corporate respondent,

Dock Case Brokerage Co., Inc., the issuance of a new license under the PACA.

PERTINENT STATUTORY PROVISIONS

1. Sec. 2(4).

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

*

*

Y

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B

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

2. Sec. 4(d).

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal Court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violations of the [PACA] by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the

applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

3. Sec. 8(a).

(a) Whenever (a) the Secretary determines as provided in section 6 that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of [the PACA,] the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

PERTINENT REGULATIONS

Sec. 46.2(aa)

'Full payment promptly' is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. 'Full payment promptly,' for the purpose of determining violations of the [PACA], means:

* * * * *

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

* * * * *

FINDINGS OF FACT

1. Dock Case Brokerage Company, (hereinafter "respondent partnership") is a partnership consisting of Messrs. Dock S. Case and Salvatore J. Toscano, whose address is 1202 E. Third Street, Lehigh Acres, Florida 33936.

2. Pursuant to the licensing provisions of the PACA, license number 81125 was issued to respondent on August 7, 1980. This license was renewed annually, but terminated on August 7, 1982, pursuant to section 4(a) of the PACA (7 U.S.C. 499d(a)), when respondent partnership failed to pay the required annual license fee.

3. Dock Case Brokerage Co., Inc., (hereinafter "respondent corporation"), is a corporation whose address is 912 North Town & River Drive, Fort Myers, Florida 33907.

4. Respondent corporation is not now, and never has been, licensed under the PACA. Although the respondent corporation has been in existence since on or about June 1, 1981, it was not operated until some time after July 1, 1982.

5. Although the respondent corporation has operated since July 1982, without a valid and effective PACA license in violation of section 3 of the PACA (7 U.S.C. 499c), complainant has not sought its sanction in that respect. Inasmuch as it did not incur the unpaid indebtedness which is the subject of the disciplinary complaint, complainant has asked that the complaint be dismissed in respect to the respondent corporation.

6. Since 1977, the respondent partnership had purchased tomatoes as a broker for Sam Peatro who later went into business with Johnny Madera, the owner of a corporation known as Tomatoes, Inc. Sometime prior to March of 1982, Peatro-Madera-Tomatoes, Inc., incurred debts for produce in excess of \$160,000. Dock Case, as their broker, pressed them to pay those debts which they did, but Mr. Case was unaware that they owed other substantial sums to West Coast shippers. The credit rating of Tomatoes, Inc., was therefore poor and sellers refused to bill it directly for produce. Not being able to obtain tomatoes for this client in his capacity as a broker, Dock Case obligated the respondent partnership to directly pay three sellers the sum of \$142,912.65 for 20 lots of tomatoes shipped to Tomatoes, Inc., during the period March through May 1982. Tomatoes, Inc., failed to pay for the tomatoes, and Dock Case has signed promissory notes and entered into payment arrangements for the debts, under which the indebtedness would continue for at least two more years and as many as five years. At the hearing Mr. Case advised that he still owed in excess of \$120,000.

7. Mr. Case has admitted to full responsibility for the circumstances testifying that his partner, Salvatore J. Toscano, took no part in any of these or any other business decisions; that Dock Case alone ran the company and made its decisions; and that Toscano basically insisted on produce and worked for Dock Case, who made him a partner to help him go when Case had to cut back his overhead. Shippers, Mr. Case testified, still deal with him as his business reputation is still good, but credit is not sufficient, however, to enable him to borrow the

of the debt and pay it in full. For each year he is unlicensed or precluded from employment by a licensee, Dock Case will lose reasonably anticipated annual earnings of \$60,000 to \$70,000.

CONCLUSIONS

1. The tomatoes on which respondent Dock Case Brokerage Company took billing during March through May 1982 that are the subject to the disciplinary complaint proceeding, were in interstate and foreign commerce, and the Secretary has jurisdiction herein under the PACA.
2. The failure by respondent Dock Case Brokerage Company to make full payment for produce under the circumstances described in the findings of fact constitutes flagrant and repeated violations of the PACA and, inasmuch as respondent is presently unlicensed, the appropriate sanction is the publication of the facts and circumstances of those violations.
3. Respondent Dock Case Brokerage Co., Inc., took no part in the transactions that are the subject of the disciplinary proceeding and that proceeding is dismissed in respect to the respondent corporation.
4. The license application under the PACA by Dock Case Brokerage Co., Inc., should be denied on the basis that it is unfit to engage in the business of a commission merchant or dealer because Dock S. Case, an officer and owner of more than 10 percent of its stock, engaged in practices prohibited by the Act.

These conclusions are based on a long line of decisions by the present Judicial Officer which, upon appeal, have been upheld by the courts. Complainant's brief contains an extensive list of these decisions which need not be again stated.

The most recent appellate decision to review the Judicial Officer's "harsh sanction policy" and consistent rejection of all circumstances offered in mitigation is *Finer Foods Sales Co. Inc. v. Block*, 708 F.2d 774, 781-782, (D.C. Cir. May 27, 1983):

"The petitioner argues that the Judicial Officer improperly refused to consider various 'mitigating factors' that, according to it, should have been viewed as excusing its failure to pay its debts. . . . In refusing to consider these factors, the Judicial Officer pointed out that 'it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were wilful since "the Act calls for payment—not excuses." . . .

"The Judicial Officer properly interpreted the Act. It makes it unlawful for a licensee to 'fail or to refuse . . . to . . . make full payment promptly.' . . .

"In sum, the 'goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act.' *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), cert. denied, 389 U.S. 835 (1967) quoted in *Marvin Tragash Co. v. United States Dep't. of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).

"The strict policy of the Secretary that all excuses for nonpayment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant."

In accordance with this now well-established Departmental policy, a broker who accepts billings on produce delivered to a customer does so at the risk of his license being forfeit if the seller goes unpaid. In taking direct billings, a broker puts himself in his customer's place and subjects himself to this and other consequences of the Department's harsh sanction policy. Obviously, Mr. Case was foolhardy for placing his partnership in that position in circumstances where there was every indication that his client's financial condition was precarious and where the partnership did not have sufficient capital to make good the payment guarantee. The suppliers, on the other hand, delivered produce on the strength of Case's undertaking to be directly responsible for their bills and, as a result, they have suffered the loss of over \$120,000.

Under the Department's sanction policy, a finding that repeated and flagrant violations have been committed is entered in all "no-pay" proceedings where a former licensee incurred a substantial indebtedness for several or more purchases of fresh produce which is not fully paid by the time of the hearing.

In consequence of the finding, all persons "responsibly connected with the licensee may not be employed by another licensee for one year from entry of the finding and may be employed during the second year following only upon the posting of bonds satisfactory to the Secretary.

Another consequence is the denial of any license application by a corporation that has an officer or a holder of more than ten percent of its stock who was found to have engaged in the prohibited practice.

Accordingly, the following order shall be entered.

ORDER

Respondent Dock Case Brokerage Company has committed repeated and flagrant violations of the PACA.

The application of respondent Dock Case Brokerage Co., Inc., for a PACA license is denied.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision shall become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 C.F.R. §1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final September 27, 1983.—Ed.]

(No. 22,908)

In re: RALEIGH PRODUCE MARKET, INC. PACA Docket No. 2-6301.
Decided August 24, 1983.

Failure to pay promptly—Publication of the facts—Default.

Edward M. Silverstein, for complainant.

H. Wayne Vaiden, Jr., Memphis, Tennessee, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "PACA," instituted by a complaint filed on June 9, 1983, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February 1982 through September 1982, respondent purchased and accepted, in interstate and foreign commerce, from 31 sellers, 265 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$97,811.08.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice Governing Adjudicatory Administrative Proceedings Instituted By the Secretary (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Raleigh Produce Market, Inc., is a corporation, whose address is 4061 Yale Road, Memphis, Tennessee 38128.

2. Pursuant to the licensing provision of the PACA, license number 820336 was issued to respondent on December 7, 1981. This license terminated on December 7, 1982, pursuant to Section 4(a) of the PACA (7 U.S.C. 499d(a)), when respondent failed to pay the annual license fee.

3. During the period February 1982 through September 1982, respondent purchased and accepted in interstate and foreign commerce, from 31 sellers, 265 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$97,811.08.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 265 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the PACA (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the PACA (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final September 30, 1983.-Ed.]

(No. 22,909)

In re: MAGGIE-PAUL, INC. PACA Docket No. 2-6290. Decided October 4, 1983.

Failure to pay promptly—Revocation of license.

Edward M. Silverstein, for complainant.

C Peter Buhler, Coral Gables, Florida, for respondent.

Decision by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter referred as the "Act"), instituted by a complaint filed on May 25, 1983, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The complaint alleges that during the period November 1982 through January 1983, Respondent, failed to make full payment promptly to 11 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$912,072.00, for 31 lots of mixed fruit, purchased, received, and accepted in interstate commerce. A copy of the complaint was served upon Respondent. The Respondent and Complainant have now agreed to the entry of a Decision and Order as set forth herein. Therefore, pursuant to Section 1.138 of the Rules of Practice (7 CFR 1.138), the following Decision and Order is issued without further procedure or hearing.

FINDINGS OF FACT

1. Maggie-Paul, Inc. (hereinafter "Respondent"), is a Florida corporation, whose business address is 56 East Fifth Street, Hialeah, Florida 33010.
2. Pursuant to the licensing provisions of the Act, license number 811641 was issued to Respondent on August 31, 1981. This license has been renewed annually and was next subject to renewal on or before August 31, 1983.
3. The Secretary has jurisdiction over the subject matter.
4. As set forth more fully in paragraph 5 of the complaint Respondent, during the period November 1982 through January 1983, failed to make full payment promptly to 11 sellers of the agreed purchase prices, or balances thereof, in the amount of \$912,072.00 for 31 lots of mixed fruit purchased, received, and accepted in interstate commerce.

CONCLUSIONS

Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), by failing to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 4 above, for which the Order below is issued.

ORDER

Respondent's license is revoked.

This order shall become effective on the fourteenth day after this Decision and Order is issued.

Copies hereof shall be served upon the parties.

(No. 22,910)

In re: JAROSZ PRODUCE FARMS, INC. PACA Docket No. 2-6031. CUSTOM PACKERS, INC. PACA Docket No. 2-6176. Decided October 6, 1983.

Failure to pay, and to pay promptly—Revocation of license—Application for license denied.

The Judicial Officer, affirmed the Administrative Law Judge's initial decision and order revoking respondent Jarosz' license for failing to pay for produce, and denying respondent Custom Packers' application for a license because of the violations.

The evidence shows that respondent Jarosz purchased onions from the growers and resold them to his customer and did not act merely as an agent involved in the sale. An inference is drawn that respondents' testimony would have been adverse to their position since they did not testify. Creditors' acceptance of less than full payment does not negate a violation. Agreements for delayed payment must be made at the time the contract is made. Failure to pay is a serious violation resulting in a license revocation order or, if a license is not in effect, and order finding that respondent has committed repeated and flagrant violations, which has the same effect as a revocation order. Respondent's violations were repeated, flagrant and wilful. The Act calls for payment—not excuses. All excuses, including bankruptcy, are rejected. A determination under §4(a) of the Act as to whether the circumstances of respondent's bankruptcy did not warrant automatic termination of its license under §4(a) is not a condition precedent for exercise of the revocation power in §8(a) of the Act.

The license of respondent Jarosz Produce Farms, Inc. was revoked. The application of respondent Custom Packers, Inc. for the issuance of a license was denied.

Dennis Becker, for complainant.

Michael Gottlieb, Middletown, New York, for respondent.

Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*), against respondent Jarosz Produce Farms, Inc., and a Notice to Show Cause proceeding as to why respondent Custom Packers, Inc., should not be

denied a license under the Act. Administrative Law Judge Dorothea A. Baker filed an initial Decision and Order on July 25, 1983, revoking respondent Jarosz' license for failing to pay 11 sellers in 37 transactions over \$100,000 for produce purchased and accepted in interstate commerce during the period from May through September 1981, and for failing to pay promptly an additional \$113,063.10 to such sellers. Judge Baker denied the application for a license by respondent Custom Packers, Inc., on the ground that John J. Jarosz, the President and a 50% stockholder of Custom Packers, Inc., was directly responsible for the violations of respondent Jarosz Produce Farms, Inc.¹

On August 30, 1983, respondents appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§556 and 557 has been delegated (7 C.F.R. §2.35).² On September 15, 1983, the case was referred to the Judicial Officer for decision.

For the reasons set forth below, Judge Baker's order is affirmed. The findings of fact are taken verbatim from Judge Baker's findings, except that (i) the words "for onions" are added to Finding 6, (ii) the words "and not a broker" are deleted from Finding 10 following the words "as an agent," and (iii) the word "That" is deleted from the beginning of subsection "(4)" of Finding 10.

FINDINGS OF FACT

1. The address of Jarosz Produce Farms, Inc., is Post Office Box 176, Pine Island, New York 10969. Pursuant to the licensing provisions of the Act, license number 197158 was issued to Respondent on June 25, 1962, and continually renewed thereafter. It currently is in effect. The license of Jarosz Produce Farms, Inc., from 1962 to the present, has neither been suspended nor revoked at any time prior hereto.

2. The address of Custom Packers is Star Route, Box 9, Vernon Crossing Road, Vernon, New Jersey 07462. On November 24, 1982,

¹See generally Campbell, "The Perishable Agricultural Commodities Act Regulatory Program," in 1 Davidson, Agricultural Law, ch. 4 (1981 and Aug. 1983 Supp.), and Becker and Whitten, "Perishable Agricultural Commodities Act," in 10 Harl, Agricultural Law, ch. 72 (1980 and May 1982 Supp.).

²The career position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), reprinted in 5 U.S.C. app., at 764 (1976). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Custom Packers filed an application for a PACA license which reflected that its President is John J. Jarosz, and that he is also a holder of 50 percent of the outstanding stock of the corporation. The application further reflects that Jane Jarosz is the Secretary, Treasurer, and a holder of the remaining 50 percent of the outstanding stock.

3. During the period May 1981, through September 1981, John J. Jarosz and Jane Jarosz were officers, directors, and the sole stockholders of Jarosz Produce, a New York corporation. These two individuals are the same individuals as those named as President and holder of 50 percent of the outstanding stock and Secretary, Treasurer, and holder of 50 percent of the outstanding stock of Custom Packers.

4. Between May 1981 and September 1981, John J. Jarosz entered into a contract with North American Registrar and Transfer Corporation under which he would sell to that corporation approximately 44,000 bags of onions. To fill the order, Mr. Jarosz dealt with the produce creditors identified as being involved in transactions 6 through 35 of paragraph 5 of the Complaint against Jarosz Produce Farms. Mr. Jarosz spoke directly with the farmers involved, made representations to them as to his intentions to dispose of the onions in interstate commerce to North American Registrar and Transfer Corporation, and purchased the onions from the farmers for use by Jarosz Produce Farms.

5. North American took delivery of only approximately 21,851 bags of the onions, leaving the balance in Respondent Jarosz' possession to dispose of as best he could.

6. North American Registrar and Transfer Corporation failed to make prompt and full payment to Jarosz Produce for onions purchased by it from Jarosz Produce Farms, Inc.

7. During the period May 1981, through September 1981, Jarosz violated section 2(4) of the PACA (7 U.S.C. 499b(4)) by purchasing 37 lots of perishable agricultural commodities from 11 sellers in interstate commerce, which commodities were received and accepted by Jarosz, but for which Jarosz failed to make full payment of the agreed purchase prices in the amount of \$100,263.50, or, full payment promptly in the total amount of \$113,063.10, with the potential that its failure to make full payment will be much larger if it fails to meet the terms of its plan of reorganization under Chapter 11 of the Bankruptcy Act.

8. On July 8, 1982, Jarosz entered a second amended plan of reorganization pursuant to Chapter 11 of the Bankruptcy Act under which the produce creditors involved in this proceeding would receive, over a period of approximately four years, about 53 percent of the money due plus an interest in the assignment of a cause of action by Jarosz against North American. An Order confirming the plan was entered by the U.S. Bankruptcy Court for the Southern District of New York.

9. An examination of the facts, including the understanding of the parties at the time the produce was procured, as revealed by the record herein, does not reflect that the actual relationship between Jarosz and the sellers (creditors) was one of agency.

10. Notwithstanding the Respondents' contention that Respondent, Jarosz Produce Farms, Inc., was acting as an agent, the persuasive evidence herein shows that:

(1) Many of the sellers were, in fact, growers, and three witnesses, supplied by Complainant, testified that they sold to Jarosz Produce Farms;

- (2) The sale invoices indicate Jarosz was being billed;
- (3) Jarosz provided receipts to several of them; and

(4) Jarosz Produce Farms, Inc., purchased perishable agricultural commodities from sellers named in the Complaint and sold such perishable agricultural commodities to others, including North American Registrar and Transfer Corporation.

11. The Secretary of Agriculture is not precluded from taking disciplinary action in this case because he never acted on an alleged "verbal" complaint which had been made on behalf of Jarosz Produce Farms, Inc., against North American Registrar and Transfer Corporation or because the Secretary of Agriculture has not investigated the facts and circumstances of the bankruptcy proceeding filed by Respondent Jarosz on October 16, 1981. There was no formal request for an examination of the circumstances of Jarosz' bankruptcy.

The "verbal complaint" against North American referred to by Respondent (Page 20, Complainant's Exhibit 2) is not sufficiently specific to constitute a formal complaint, nor was it ever pursued. It appears to have been made as a defense to non-payment, because North American did not fulfill what Jarosz considered to be a contract with North American.

12. By virtue of its failure to make full payment to various produce creditors, Jarosz Produce Farms, Inc., has committed willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act, for which violations its license to do business should be revoked.

13. By virtue of his direct dealing with produce farmers in the purchase of onions to be resold to North American Registrar and Transfer Corporation, John J. Jarosz, acting as the President of Jarosz Produce Farms, who is also the President and a 50 percent stockholder of Custom Packers, engaged in practices of the character prohibited by the Act because he was directly responsible for the occurrence of the transactions which resulted in the failures to pay the produce creditors involved.

CONCLUSIONS

I.

Respondents argue that respondent Jarosz Produce Farms, Inc., did not fail to pay the produce creditors referred to in the findings of fact because respondent Jarosz was merely an agent involved in the sale from the produce creditors to North American Registrar and Transfer Corporation. However, the overwhelming weight of the evidence shows that respondent Jarosz purchased the onions from the produce creditors and resold them to North American.

Three of the produce creditors testified that they sold their onions to respondent Jarosz. A number of invoices are contained in the record from sellers who billed respondent Jarosz as the buyer. Moreover, the record in this case contains copies of documents filed in the Chapter 11 Bankruptcy proceeding involving respondent Jarosz Produce Farms, Inc., in which respondent Jarosz lists the produce creditors involved here as its creditors. The produce creditors have received partial payment of the debts referred to in the complaint in this case pursuant to respondent Jarosz' plan of reorganization approved by the bankruptcy judge.

Respondent Jarosz states in its disclosure statement upon which its plan of reorganization in bankruptcy was based (Second Amended Disclosure Statement, at 8):

The debtor's business since its incorporation has been primarily that of a wholesale, purchaser, seller and repacker of vegetables, primarily onions.

Nothing is said in respondent Jarosz' disclosure statement that it ever acted merely as an agent.

Furthermore, no witness testified for respondent Jarosz Produce Farms, Inc., in this administrative proceeding. Under the settled principle which has been followed in many proceedings before this Department³ and in

³E.G., *In re Farrow*, 42 Agric. Dec. 1397 (Sept. 21, 1983); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02 (1983), appeal docketed, No. 83-1339 (7th Cir. Feb. 25, 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n. 4 (1983), appeal docketed, No. 83-7063 (9th Cir. Feb. 1, 1983); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D. N.J. Jan. 24, 1983), appeal docketed, No. 83-5098 (3d Cir. Feb. 9, 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6486 (C.D. Cal. Oct. 20, 1982), appeal docketed, No. 82-6029 (9th Cir. Nov. 12, 1982); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979);
(cont. next page)

many judicial proceedings,⁴ I infer that the testimony of respondent Jarosz' officials would have been adverse to respondents. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch v. Archer*, Cowp. 66, quoted with approval in Wigmore, *Evidence* (3d ed. 1940), §285.

The only evidence indicating that respondent Jarosz was an agent in the transactions with the onion growers consists of a copy of a complaint filed against North American Registrar and Transfer Corporation in a Florida State court by 8 of the 11 onion growers involved here, claiming damages from North American because of its failure to fulfill its agreement made with respondent Jarosz. In that State court complaint, the growers allege that Jarosz was their "agent" in the transactions with North American.

However, the State court complaint has little weight here because (i) the complaint consists merely of unsworn allegations, (ii) one of the growers, Edward J. Gerczak, testified without contradiction that the growers asked their attorney not to pursue the State court action against

(cont.)

In re Wilcox, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), aff'd, 570 F.2d 724 (8th Cir.), cert. denied, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, aff'd mem., 582 F.2d 39 (6th Cir. 1978); *In re Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), aff'd per curiam, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), aff'd, 618 F.2d 1329 (9th Cir.) (2-1 decision), cert. denied, 449 U.S. 1061 (1980); *In re Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), aff'd per curiam, 558 F.2d 748 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casca*, 34 Agric. Dec. 1917, 1929-30 (1976); *In re Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), aff'd mem., 510 F.2d 966 (4th Cir. 1975); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

⁴2 Wigmore, *Evidence* (3d ed. 1940), §§285-291; *United States v. D1 RE*, 332 U.S. 581, 93 (1948); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939); *Khby v. tallmadge*, 160 U.S. 379, 383 (1896); *Karavos Compania, Etc. v. Atlantica Export Corporation*, 588 F.2d 1, 9-10 (2d Cir. 1978); *International Union v. N.L.R.B.*, 465 F.2d 357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co. v. Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cromling v. Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman v. C.I.R.*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co. v. 'Aples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhofer v. Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles v. Lentini*, 151 F.2d 615, 9 (7th Cir.), cert. denied, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co. v. Ratcliff*, 108 2d 253, 256-57 (C.C.P.A. 1939); *National Labor Relations Bd. v. Remington Rand c.*, 94 F.2d 862, 867-68 (2d Cir.), cert. denied, 304 U.S. 576 (1938).

North American (Tr. 74), and (iii) the State court action may have been filed by the growers' attorney merely as a precautionary measure, out of an abundance of caution.

In any event, the unsworn allegations in the complaint filed on behalf of 8 of the 11 growers involved here does not begin to have the weight of the debtors' petition filed by respondent Jarosz in the bankruptcy proceeding in which John J. Jarosz stated for Jarosz Produce Farms, Inc., under penalty of perjury that all the growers involved in the present proceeding were creditors of respondent Jarosz with respect to all the transactions involved in this proceeding.

Respondent Jarosz, having admitted in its bankruptcy proceeding that all of the produce creditors involved in the administrative complaint in this proceeding are its creditors as to all of the transactions referred to in the administrative complaint involved here, and having begun making payments to all such produce creditors under its plan of reorganization approved by the bankruptcy judge, is in no position now to deny that it was, prior to the bankruptcy proceeding, obligated to pay those produce creditors for the onions involved in the transactions at issue here.

II.

Respondents contend that the produce creditors have agreed to accept less than full payment under the bankruptcy plan of reorganization. Under the plan of reorganization, the produce creditors will receive about 53% of their claims over a four-year period, without interest (53% of \$218,326.60 = \$118,063.10). The remainder of their claims, about 47%, or \$100,263.50, will not be paid at all unless the produce creditors recover from the assignment of respondent Jarosz' cause of action against North American.

However, it has consistently been held that where sellers agree to accept partial payment in full satisfaction of their debts, e.g., because of the debtor's bankruptcy, that does not constitute full payment, and does not negate a violation of the Act.⁵ As stated in *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 738-39 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977):

⁵*In re Finer Food Sales Co.*, 41 Agric. Dec. 1154, 1163-65 (1982), *aff'd*, 708 F.2d 7 (D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981), *aff'd*, 668 F.2d 989 (1st Cir.), *cert. denied*, 102 S. Ct. 2299 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685 (1st Cir.), *aff'd*, No. 80-3406 (6th Cir. Dec. 18, 1981), *printed in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 413-14 (1980); *In re Hal Merdler P* (cont. on ne)

It must be recognized in this respect that the interests of particular shippers who are owed money by an insolvent purchaser may be antagonistic to the interests of the Department and the general public. The particular shippers are interested in recovering as large a proportion of the amount owed as possible. It is to their financial advantage to make any agreements necessary to achieve that result. But the Department has a broader interest—*viz.*, to protect other shippers in future transactions. The primary purpose of a disciplinary order under the Act is to deter other potential violators from committing similar violations. Hence the term “full payment” in §2 of the Perishable Agricultural Commodities Act (7 U.S.C. 499b(4)) must be interpreted to mean full payment of the originally agreed purchase price where the shipper complied fully with all contract terms and there is no dispute as to the transaction. A remedial statute such as the Perishable Agricultural Commodities Act should be liberally construed to achieve the Congressional purpose.

As to agreements to extend the time for payment, §2(4) of the Act (7 U.S.C. §499b(4)) requires that full payment be made “promptly.” The regulations specify the period in which payment must be made in order to comply with that requirement (7 C.F.R. §46.2(aa)). In most instances, payment must be made within 10 days, but the regulations permit the parties by express agreement at the time the contract is made to provide for a different payment time. Specifically, the regulations provide:

That as an exception to paragraphs (aa) (1) through (9) of this section, the parties may, by express agreement at the time the contract is made, provide a different time for payment, and if they have so agreed, then payment within the time provided shall constitute “full payment promptly”: *Provided further*, That the party claiming the existence of such express agreement as to time of payment shall have the burden of proving it.⁶

(cont.)

Ine., 37 Agric. Dec. 809, 810 (1978); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1639-40 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 810 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884-87 (1975); *In re M. & H Produce Co.*, 34 Agric. Dec. 700, 738-40 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1881, 1887-88, 1892, 1896, 1899-1900 (1974), *aff'd*, 524 F.2d 1255, 1258 (5th Cir. 1975).

⁶ 7 C.F.R. §46.2(aa)(9). The regulations were amended to require an express agreement, 37 Fed. Reg. 14561 (1972), following the decision in *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1557-61 (1971), holding that an implied agreement was sufficient under the then existing regulations.

An agreement to provide a different time for payment does not have to be writing.⁷ However, the agreement must be reached at the time the contract is made, or it is meaningless for regulatory purposes. For example, an agreement to extend the time for payment made after the payment time has expired does not negate the violation.⁸

There is a sound basis for the regulatory requirement that agreements to extend the time for payment be made at the time the contract is made. After the buyer has the produce, the parties are no longer dealing on equal terms. The seller can no longer refuse to sell; the buyer is the only one with options, *i.e.*, he can pay or not pay, as agreed. Thus the buyer would have an unfair advantage in any negotiations on payment terms after delivery. In order to ensure that the parties deal on equal terms, the regulations prohibit changes after the contract is made.

III.

Respondent Jarosz has failed to pay for over \$100,000 worth of perishable agricultural commodities. Failure to pay for produce is a very serious violation of the Perishable Agricultural Commodities Act which results in an order revoking the license of the offender⁹ since it is the "goal [of the Perishable Agricultural Commodities Act] that only financially responsible persons should be engaged in the perishable agricul-

⁷*In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1557 (1971). Although the regulations were amended following this decision, the amended regulations do not require a written agreement to delay payment. 7 C.F.R. §46.2(aa)(9).

⁸*In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1137-38 (1981); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1382 (1979), *aff'd per curiam*, 630 F.2d 370, 373 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 738-40 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977).

⁹*E.g.*, *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *appeal docketed*, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1126 (1982), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 18, 1982); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1156-59 (1981), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetables Co.*, 40 Agric. Dec. 396, 401-02 (1981), *aff'd*, 668 F.2d 988 (8th Cir.), *cert. denied*, 10 Ct. 2299 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.* No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Baltic Tomato Co.*, 39 Agric. Dec. 412, 414-16 (1980); *In re Hal Merdler Produce, Inc.*, 37 Dec. 809, 811-12 (1978); *In re Solt*, 35 Agric. Dec. 721, 723, 726 (1976); *In re C-1-35* Agric. Dec. 26, 30-36 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 37 Agric. Dec. 467; *accord*, *In re Kafesak*, 39 Agric. Dec. 683, 686-87 (1980), *aff'd*, 3406 (6th Cir. Dec. 18, 1981), *printed in* 41 Agric. Dec. 88 (1982).

tural commodities industry,"¹⁰ and it is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974), set forth in the Appendix to this decision.¹¹ The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

"Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. 'On occasions, one licensee fails to pay another licensee who is then

¹⁰*Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1257 (5th Cir. 1975); *accord, Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2425 (1982), *appeal docketed*, No. 82-3826 (6th Cir. Dec. 28, 1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133 (1981); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792, 793 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 402 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 102 S. Ct. 2299 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982).

¹¹Severe sanctions issued pursuant to this policy were sustained, *e.g.*, in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd*, 624 F.2d 190 (9th Cir. 1980); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1836, 1862-63 (1978), *aff'd*, No. 78-3134 (D. N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd mem.*, 575 F.2d 879 (5th Cir. 1978); *In re Lifestock Marketers, Inc.*, 36 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Calanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd mem.*, 510 F.2d 966 (4th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

unable to pay a third licensee.' This could have serious repercussions to producers, licensees and consumers."¹²

If the violator who fails to pay for produce does not have a license in effect, an order is issued finding that the person has engaged in repeated or flagrant violations of the Act,¹³ which has the same effect on the violator and on persons responsibly connected with the violator as a license revocation.¹⁴

In the present case, respondent Jaross' failure to pay violations involved a large number of transactions (37), and were, therefore, repeated.¹⁵ Also, in view of the large amount of money not paid to shippers

¹²*In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), appeal docketed, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), printed in 41 Agric. Dec. 89 (1982); accord, *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1134 (1981). Although the Act is primarily to protect producers, it "is also 'for the protection of consumers' (H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2), inasmuch as increased industry costs resulting from failures to pay or other unfair practices are ultimately borne by consumers." *In re Catanzaro*, 35 Agric. Dec. 26, 33 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), printed in 36 Agric. Dec. 467.

¹³*E.g.*, *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2426 (1982), appeal docketed, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1168-92 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1133-34, 1151 (1981); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961, 968-71 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir. 1982), cert. denied, 103 S. Ct. 70 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 686-87 (1980), *aff'd*, No. 80-3406 (6th Cir. Dec. 18, 1981), printed in 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-21 (1978); *In re Pappas Produce, Inc.*, 36 Agric. Dec. 684, 694-96 (1977); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633, 1643-45 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), cert. denied, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1885-89 (1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 748-52 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir.), cert. denied, 434 U.S. 920 (1977); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1896-1914 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 253, 266-70 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 830 (1974).

¹⁴*In re V.P.C., Inc.*, 41 Agric. Dec. 734, 748-49 (1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1151-52 (1981); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 714-15 (1978); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750-51 (1975), *aff'd mem.*, 549 F.2d 830 (D.C. Cir. 1977), cert. denied, 434 U.S. 920 (1977).

¹⁵*Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 610 n. 6 (3d Cir. 1960); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 403 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), cert. denied, 102 S. Ct. 2299 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1640 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), cert. denied, 434 U.S. 920 (1977). (cont. on next page)

(over \$100,000), and the number of transactions, the violations were flagrant.¹⁶ The violations were also wilful, as that term is used in the Administrative Procedure Act (5 U.S.C. §558(c)). *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).

Respondents argue that the failures to pay by respondent Jarosz were caused by the failure of North American Registrar and Transfer Corporation to comply with its agreement with Jarosz. But it has repeatedly been held under the Act that all excuses, including bankruptcy, are routinely rejected in determining whether payment violations occurred or whether violations were wilful, since "the Act calls for payment—not excuses."¹⁷

(cont.)

Cir.), cert. denied, 439 U.S. 819 (1978); accord, *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169 (1982), aff'd, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1127 (1982), appeal dismissed, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 743 (1982); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1156-57 (1981), aff'd, 692 F.2d 1025 (5th Cir. 1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1181, 1185 (1981); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112 (1981), aff'd mem., No. 81-1446 (D.C. Cir. Jan. 19, 1982), printed in 41 Agric. Dec. 89 (1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 748 (1975), aff'd mem., 549 F.2d 830 (D.C. Cir.), cert. denied, 434 U.S. 920 (1977).

¹⁶*Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *In re Melvin Beere Produce Co.*, 41 Agric. Dec. 2422, 2427 (1982), appeal docketed, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1169-70 (1982), aff'd, 708 F.2d 774 (D.C. Cir. 1983); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 743 (1982); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1127-28 (1982), appeal dismissed, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1156-57 (1981), aff'd, 692 F.2d 1025 (5th Cir. 1982); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1181, 1185 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 403 (1981), aff'd, 668 F.2d 983 (8th Cir.), cert. denied, 102 S. Ct. 2299 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 112-13 (1981), aff'd mem., No. 81-1446 (D.C. Cir. Jan. 19, 1982), printed in 41 Agric. Dec. 89 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976), aff'd, No. 76-1613 (9th Cir. Mar. 9, 1977), printed in 36 Agric. Dec. 467; *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 747 (1975), aff'd mem., 549 F.2d 830 (D.C. Cir.), cert. denied, 434 U.S. 920 (1977).

¹⁷*In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (Aug. 31, 1983) (non-payment because another firm failed to pay respondent \$248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (Mar. 25, 1983) (non-payment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Meirin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (non-payment because of bankruptcy), appeal docketed, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (non-payment because of bankruptcy), aff'd, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1123 (1982) (non-payment because of bankruptcy of another firm owing respondent \$776,459.23), appeal dismissed, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec.

(cont. on next page)

As in the case of failure to make full payment, excuses as to why payment could not be made promptly are ignored since "the Act calls for payment—not excuses."¹⁸

In affirming the Judicial Officer's decision involving conclusions identical to those involved in the disciplinary proceeding here, the court held in *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983):

The petitioner argues that the Judicial Officer improperly refused to consider various "mitigating factors" that, according

(cont.)

734, 746-47 (1982) (non-payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1188-40 (1981) (non-payment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 896, 404 (1981) (non-payment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 102 S. Ct. 2299 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 118 (1981) (non-payment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (non-payment because of strike and failure of others to pay respondent), *aff'd*, No. 80-3406 (6th Cir. Dec. 18, 1981), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (non-payment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (non-payment because of railroad strike), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1978) (non-payment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord*, *In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (non-payment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (non-payment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 70 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1681, 1632-33, 1641-42 (1976) (non-payment because of financial difficulties), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (non-payment because of bankruptcy of another firm owing respondent over \$130,000.00); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (non-payment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (non-payment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1018, 1015 (1944) (non-payment because of financial difficulties).

¹⁸ *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (delayed payment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1189-40 (1981); *In re L. R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978) (delayed payment because of financial difficulties resulting from weather conditions and withdrawal from business of a brother); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 167-68 (delayed payment because of financial difficulties resulting from inexperience, overbuying and credit sales), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 130-31 (delayed payment because of uncollectable accounts), *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975).

to it, should have been viewed as excusing its failure to pay its debts. These include the allegedly relatively small amount the petitioner owed, the absence of previous violations by the petitioner, and the lack of "devious or dishonest practices by the petitioner." In refusing to consider these factors, the Judicial Officer pointed out that "it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations occurred or whether violations were wilful since 'the Act calls for payment—not excuses.'" *Quoting In re Kafcsak*, 39 Agric. Dec. 683, 686 (1980). See also *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982).

The Judicial Officer properly interpreted the Act. Section 2(4), 7 U.S.C. §499b(4) (1976), is unequivocal. It makes it unlawful for a licensee to "fail or to refuse . . . to . . . make full payment promptly." As Congress noted in amending the Act in 1956, "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law." S. Rep. No. 2507, 84th Cong., 2d Sess. (citing H. Rep. No. 1196, 84th Cong., 1st Sess.), reprinted in 1956 U.S. Code Cong. & Ad. News 3699, 3701. The Secretary explained the reason for this strict requirement in *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.* 41 Agric. Dec. 89 (D.C. Cir. No. 81-1446, Jan. 19, 1982);

Failure to pay violations not only adversely affect the party who is not paid for produce, but such violations have a tendency to snowball. "On occasions, one licensee fails to pay another licensee who is then unable to pay a third licensee." This could have serious repercussions to producers, licensees and consumers. *Quoting In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 720 (1978).

In sum, the "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S. Ct. 43, 19 L.Ed.2d 96 (1967) quoted in *Marvin Trigash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).

The strict policy of the Secretary that all excuses for non-payment are disregarded furthers this goal. Under the Act a licensee is required to conduct his business in a manner that insures that he pays his bills fully and promptly. If he fails to do so, he violates the Act. For this reason, alleged mitigating circumstances are irrelevant.

The reasons why all excuses are rejected in payment violation cas

under the Perishable Agricultural Commodities Act, and why they are not regarded as mitigating circumstances, are set forth in *In re Esposito*, 38 Agric. Dec. 613, 632-40 (1979). In that case it is stated, *inter alia* (38 Agric. Dec. at 635-40):

Most of the cases cited by Judge Weber in support of his view that mitigating circumstances are improperly disregarded are cases involving failure to pay for produce under the Perishable Agricultural Commodities Act. It is true that under that regulatory program, excuses as to why payment was not made (usually because someone else failed to pay the violator) are disregarded in determining the sanction. But that is because of the statutory provisions and the nature and history of that particular regulatory program.

The Perishable Agricultural Commodities Act makes it unlawful to "fail or refuse truly and correctly to account and make full payment promptly" (7 U.S.C. 499b(4)). It provides for the automatic suspension of a license if a firm fails to pay a reparation award or is discharged as a bankrupt (7 U.S.C. 499g(d), 499d(a)).⁷ [Footnote 7 states: "The Act was amended effective October 1, 1979, to authorize the Secretary to continue a license in effect after a discharge in bankruptcy (92 Stat. 2549, 2673)."]

The Perishable Agricultural Commodities Act was enacted at the request of the regulated industry. It is the only regulatory program administered by the Department paid for by the regulated industry through license fees. Payment violations are the very heart of the regulatory program. The industry desires and supports a toughminded administration of the Act which requires full payment irrespective of the reasons for non-payment.

The reason for the Department's position as to this Act was stated as follows in *In re J. H. Horman & Sons Distributing Co.*, 37 Agr Dec 705, 715-716, 719-720 (1978):

Unfortunately for Mr. Norman, he chose to engage in business in the regulated agricultural marketing system, which is probably the only field in which inability to pay one's bills is unlawful (or even dishonorable). Debtor's prisons are archaic; bankruptcy has lost its stigma; but the failure to pay for fruits and vegetables in commerce is unlawful (7 U.S.C. 499b(4)).

Special laws have been enacted relating to the agricultural marketing system because "a sound, efficient and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the

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maintenance of full employment and to the welfare, prosperity, and health of the Nation" (7 U.S.C. 1621).

The failure by produce marketing firms to pay for produce would have a tendency to increase overall marketing costs which, ultimately, would be reflected in lower farm prices, higher consumer prices, or both. This would be contrary to the expressed purpose of Congress to provide for "an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed" (7 U.S.C. 1621).

The need for a severe sanction in cases of this nature was explained in *In re Sam Leo Catanzaro, supra*, 35 Agr. Dec. 26, 32-36 (1976), affirmed *sub nom. Catanzaro v. United States and Butz*, No. 76-1613 (C.A. 9), decided March 9, 1977 (36 Agr. Dec. 467), as follows (see, also, Tr. 19-70):

The severe sanction imposed in this case for the respondent's serious, repeated and flagrant violations of the Act is consistent with the Congressional purpose in enacting the statute. "The Perishable Agricultural Commodities Act is admittedly and intentionally a 'tough' law" (H.R. Rep. No. 1196, 84th Cong., 1st Sess., p. 2). "The law has fostered an admirable degree of dependability and fairness in this industry***. ***In spite of the strictness of some of the provisions of the law, the act and its administration by the Department of Agriculture have won the almost unanimous approval of this important food distributing industry and now have its virtually undivided support" (*ibid.*).¹⁹

¹⁹Accord, S. Rep. No. 2507, 84th Cong., 2d Sess. 3-4 (1956); *United States v. William B. Mandell Co.*, 242 F. Supp. 873, 875 (E.D. Pa. 1965); *In re Columbus Fruit Co.*, 4 Agric. Dec. 109, 113-14 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982).

In *Birkenfield v. United States*, 369 F.2d 491, 494 (C.A. 3), the Court stated:

The object of the Act is to suppress unfair and fraudulent practices in the industry. Enacted in 1930, the Act is regarded today as one of the government's most successful regulatory programs, and the Act has received enthusiastic support from members of the regulated industry.²⁰

The "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Marvin Tragash Co. v. United States Dept. of Agr.* [524] F.2d [1255] (C.A. 5), No. 75-1481, decided December 24, 1975. The purpose of the Act was stated in *Zwick v. Freeman*, 373 F.2d 110, 116 (C.A. 2), certiorari denied, 389 U.S. 835, as follows:

The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for

²⁰In a Congressional report as to a 1962 amendment to the Act, it is stated (H.R. Rej No. 1546, 87th Cong., 2d Sess. 3 (1962)): "Testimony of the shippers, brokers, wholesaler and other elements of the trade in fresh and frozen fruits and vegetables who have been operating under this act is enthusiastically and almost unanimously in its support. It has brought a high degree of stability and responsibility to an industry which had frequently been beset by instability and irresponsibility. It is regarded as one of our most successful regulatory programs." Accord: *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 114 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982).

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sharp practice and irresponsible business conduct. H. Rept. No. 1196, 84th Cong. 1st Sess. 2 (1955).

* * *

Revocation of respondent's license, in view of his repeated and flagrant violations of the Act, is not only authorized by the Act (7 U.S.C. 499h(a)) [footnote omitted], but is also consistent with other provisions of the Act, which are not applicable here. . . . Similarly, if a licensee fails to pay a reparation order under the Act, his license is automatically suspended until the reparation order is paid, irrespective of whether he is unable to pay because of circumstances beyond his control (7 U.S.C. 499g(d)).

* * *

If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee's ability to meet its obligations, it must immediately obtain more capital, or suffer the consequences if violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to the risk resulting from respondent's undercapitalization or bad debt experience.

The peculiar vulnerability of producers of perishable agricultural commodities and livestock, and the importance of the Department's regulatory programs to assure payment for these commodities, were again recognized by Congress in the recent Bankruptcy Act amendments, in which it is provided (92 Stat. 2549, 2593):

§525. Protection against discriminatory treatment

Except as provided in Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled "An Act making appro-

priations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204),⁸ a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

Congressmen Foley, Chairman of the House Agriculture Committee, explained the need for the foregoing special provisions applicable to the Perishable Agricultural Commodities Act and the Packers and Stockyards Act as follows (Proceedings and Debates of the 95th Cong., 1st Sess., Vol. 19, pp. H 11761-H 11762 (October 28, 1977) [, now 123 Cong. Rec. 35671-72 (1977)]):

Under the Packers and Stockyards Act and the act of July 12, 1943, persons purchasing livestock in commerce are required to conduct their businesses in a financially responsible manner, and market agencies and dealers *** are required to have a bond and to pay for all livestock purchased. The licenses of market agencies and dealers may be suspended if they become insolvent. Packers may be ordered to cease and desist from failing to pay for livestock and packers who become insolvent may be ordered to cease and desist from operating except under such conditions as the Secretary may impose.

⁸This is an Act supplementing the Packers and Stockyards Act.

Under the Perishable Agricultural Commodities Act, commission merchants, dealers, and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.

The Committee on Agriculture has no quarrel with the "fresh-start" philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the Act of July 12, 1943.

The Committee on Agriculture conducted oversight hearings on the PACA program twice in the 94th Congress and found that the program is generally operating well and serving its purpose in protecting the producers of perishable agricultural commodities and the public. Last year, after extensive hearings, Congress enacted Public Law 94-410 which made extensive amendments to the Packers and Stockyards Act and the act of July 12, 1943, to assist the Secretary to prevent recurrence of the catastrophic losses to livestock producers which attended the bankruptcies of several large packers in the past few years. Both of these programs must be continued if this Nation is to continue to have a ready source of nutritious food at prices which are reasonable to both the producer and the consumer.

Considering all of the circumstances, there is a sound basis for the Department's position that excuses as to why payment was not made should not be regarded as a mitigating circumstance where there are serious payment violations. Although the Department's approach to enforcing the Perishable Agricultural Commodities Act appears harsh, in many cases it is

not as harsh as it would seem. For example, many persons who suffer a financial loss or otherwise become in a precarious financial position continue to operate for many months and even increase their business substantially, without obtaining new capital, thereby subjecting many persons who sell produce to them to the risk of financial loss. Such conduct has repeatedly been characterized as "flagrant." See *In re John H. Norman & Son Distributing Co.*, 37 Agr. Dec. 705, 713 (1978); *In re Atlantic Produce Co.*, 35 Agr. Dec. 1631, 1640-1641 (1976), [aff'd mem.], 568 F.2d 772 (4th Cir.), cert. denied, 439 U.S. 819 (1978); *In re Sam Leo Catanzaro*, 35 Agr. Dec. 26, 31 (1976), affirmed *sub nom. Catanzaro v. United States and Butz*, No. 76-1613 (C.A. 9), decided March 9, 1977 (36 Agr. Dec. 467); *In re M. & H. Produce Co.*, 34 Agr. Dec. 700, 747 (1975), [aff'd mem.], 549 F.2d 830 (D.C. Cir.), cert. denied, 434 U.S. 920 (1977); *In re George Steinberg & Sons*, 32 Agr. Dec. 236, 243-244 (1973), affirmed *sub nom. George Steinberg & Sons, Inc. v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

As stated in *Zwick v. Freeman*, 373 F.2d 110, 115, (C.A. 2), certiorari denied, 389 U.S. 835—

it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act. It would be hard to imagine clearer examples of "flagrant" violations of the statute than were exemplified by petitioners' conduct.

In addition, many firms which experience losses that result in their ultimate failure to pay experience such losses because they were not sufficiently cautious in extending credit. See, e.g., *In re J. H. Norman & Sons Distributing Co.*, 37 Agr. Dec. 705, 708-709 (1978).

But even where the failure to receive payment could not have been reasonably foreseen, and the firm immediately discontinues business (being unable to pay all of its creditors), if "a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result." *In re J. H. Norman & Sons Distributing Co.*, 37 Agr. Dec. 705, 719 (1978).

Undoubtedly there have been some cases where the policy under the Perishable Agricultural Commodities Act has been "harsh," but "occasional hardship to the

individual is a consideration outweighed by the declared policy of Congress. *Zwick v. Freeman, supra*, 373 F.2d at 118. See, also, *United States v. Dotterweich*, 320 U.S. 277, 284-285; *Callaghan v. Reconstruction Finance Corp.*, 297 U.S. 464, 468; *Dairymen's League Cooperative Ass'n v. Brannan*, 173 F.2d 57, 66 (C.A. 2), certiorari denied, 338 U.S. 825; *General Ice Cream Corp. v. Benson*, 113 F. Supp. 107, 108 (N.D. N.Y.), affirmed, *per curiam*, 217, F.2d 646 (C.A. 2)." *In re George Steinberg & Son*, 32 Agr. Dec. 236, 248 (1973), affirmed *sub nom. George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

Accordingly, unless there are decisive considerations relating to respondent Jarosz' bankruptcy that compel a contrary conclusion, respondent Jarosz' license should be revoked for the repeated and flagrant violations found here.

IV.

Respondents contend that respondent Jarosz' license cannot be revoked because the Secretary did not make a determination, under §4(a) of the Act (7 U.S.C. §499d(a) (1979 Supp.)), as to whether the circumstances of respondent's bankruptcy did not warrant automatic termination of its license under §4(a). Section 4(a) of the Act, as amended by the Bankruptcy Reform Act of 1978, provides (7 U.S.C. §499d(a) (1979 Supp.)):

That the license of any licensee shall terminate upon said licensee, or in case of the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, *which he shall examine if requested to do so by said licensee*, that such circumstances do not warrant such termination. (Emphasis added.)

The short answer to this contention is that respondent Jarosz failed to make a request that the Secretary examine the circumstances of its bankruptcy (Finding 11). However, the better answer to the contention is that the Secretary has taken no action relating to respondents under §4(a) of the Act and, therefore, §4(a) is irrelevant.

The Secretary's power to revoke a license, which is being exercised here, is in §8(a) of the Act, which was not amended by the 1978 Bankruptcy law. Section 8(a), which is the section involved in the present proceeding, provides (7 U.S.C. §499h(a)):

Whenever (a) the Secretary determines, as provided in sec-

tion 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

There is nothing in the Act or its legislative history to suggest that the Secretary's power to revoke a license for a flagrant and repeated violation can only be exercised, in the case of a bankrupt, if the Secretary has first complied with the bankrupt's request under §4(a) for a determination as to whether the circumstances of his bankruptcy do not warrant the automatic termination of his license under that section. Accordingly, there is no basis for engaging in "judicial legislation" by writing into the Act a condition which Congress did not see fit to enact.

In addition, there is nothing in the 1978 Bankruptcy law or its legislative history to indicate that the exercise of the Secretary's discretion under §4(a) as to automatic license termination is a condition precedent to the exercise of his power to revoke a license for flagrant and repeated violations of the Perishable Agricultural Commodities Act under §8(a) of that Act. As shown above, pages 25-27, in the quotation from the *Esposito* case, in the 1978 Bankruptcy law, Congress specifically exempted two regulatory programs—the Perishable Agricultural Commodities Act and the Packers and Stockyards Act—from the provisions of §525 of the Bankruptcy law (11 U.S.C. §525 (1979 Supp.)) that otherwise would have prevented the revocation of a license because of bankruptcy or the failure to pay a debt dischargeable under the Bankruptcy law.

Section 525 of the 1978 Bankruptcy law was enacted to codify *Perez v. Campbell*, 402 U.S. 637 (1971), which held that a State would frustrate the Congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy. Section 525 of the 1978 Bankruptcy law extends the *Perez* holding to both state and federal governmental agencies. The legislative history of the 1978 Bankruptcy law states that §525 codifies the result of *Perez* (S. Rep. No. 95-989, 95th Cong., 2d Sess. 81 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 366-67 (1977)). But as shown above the Perishable Agricultural Commodities Act regulatory program was expressly excepted from §525.

Prior to the 1978 Bankruptcy law, it was held that where a respond

ent's failure to pay under the Perishable Agricultural Commodities Act results from bankruptcy, there is no unconscionable or excessive conflict between the Department's disciplinary action revoking the respondent's license under the Perishable Agricultural Commodities Act and the bankruptcy law.²¹ As shown above, §525 of the 1978 Bankruptcy law expressly preserves the right of the Secretary to revoke a bankrupt's license under the Perishable Agricultural Commodities Act because of debts dischargeable in bankruptcy.

The Chairman of the House Committee on Agriculture, who proposed the amendment exempting the Perishable Agricultural Commodities Act and the Packers and Stockyards Act from the provisions of §525 of the 1978 Bankruptcy law, stated (123 Cong. Rec. 35671 (1977)):

The Agriculture Committee has no quarrel with the basic philosophy underlying this provision which is to prevent discrimination against a person solely—and I emphasize the word "solely"—because that person has undergone bankruptcy. However, I am concerned that, without clarification, the section might be interpreted in such a way as to prevent the Secretary of Agriculture from carrying out his statutory responsibilities under the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the supplementary packers and stockyards legislation contained in the Act of July 12, 1943, 7 U.S.C. 204. This amendment is simply designed to clarify the fact that section 525 does not in any way interfere with administration by the Secretary of Agriculture of these statutes.

Other statements made at the same time by the Chairman of the House Committee on Agriculture are set forth above (pp. 26-27) in the lengthy quotation from the *Esposito* case, including the Chairman's statement that, under the Perishable Agricultural Commodities Act,

²¹*Zwick v. Freeman*, 373 F.2d 110, 115-17 (2d Cir.), cert. denied, 389 U.S. 835 (1967); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883-87, 1890-92, 1897-98 (1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1908-13 (1974), *aff'd*, 524 F.2d 1255, 1256-58 (5th Cir. 1975), *In re George Steinberg & Sons, Inc.*, 32 Agric. Dec. 236, 255-59 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), cert. denied, 419 U.S. 830 (1974); and see *In re Metum Beene Produce Co.*, 41 Agric. Dec. 2422, 2433-40 (1982), *appeal docketed*, No. 82-3826 (6th Cir. Dec. 23, 1982); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1176-82 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983), *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1144-50 (1981); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961, 969 (1981), *aff'd mem.*, 681 F.2d 804 (3d Cir. 1982), cert. denied, No. 81-2207 (Oct. 4, 1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 115 (1981), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982).

"[f]ailure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license" (123 Cong. Rec. 35672 (1977)). With that knowledge, Congress passed the amendment excepting PACA from §525 of the Bankruptcy law.

Although additional legislative history is somewhat superfluous, there is further strong legislative history consistent with that set forth above.

Shortly before the House agreed to amend §525 of the 1978 Bankruptcy law by excepting the Perishable Agricultural Commodities Act and the Packers and Stockyards Act from the provisions that otherwise would have precluded license revocations because of bankruptcy or debts dischargeable in bankruptcy, Mr. Panetta stated (123 Cong. Rec. 35672 (1977)):

I commend the gentleman from Washington (Mr. Foley), the distinguished chairman of the Committee on Agriculture, for offering this amendment. As the gentleman knows, I will be offering a complementary amendment with regard to section 303 that will in effect carry on the basic thrust of the gentleman's amendment.

The Perishable Agricultural Commodities Act is the mainstay of the fresh fruit and vegetable market. What these amendments attempt to do is to restore the authority of the Secretary of Agriculture under that law.

Shortly later, and immediately before the House agreed to the amendment excepting the Perishable Agricultural Commodities Act from §525, Mr. Butler stated (123 Cong. Rec. 35673 (1977)):

Mr. BUTLER. Mr. Chairman, I would like to note that section 525 of the new Bankruptcy Code by its very terms applies only in situations in which governmental units, either in hiring or in administering licensing programs, discriminate solely on the basis of whether a person is, or has been, a bankrupt. The gentleman from Washington (Mr. Foley) correctly points out that the section applies only where the discrimination is practiced "solely" on that basis.

I am told that lawyers at the Agriculture Committee and in the General Counsel's Office at the Department of Agriculture are nevertheless of the opinion that, without clarification, section 525 might be interpreted to prevent the Secretary from taking necessary regulatory actions under the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the act of July 12, 1943, 7 U.S.C. 204. It is difficult for me to understand this interpretation. As noted in our report, it was never the intention of the Judiciary Committee to interfere

with legitimate regulatory objectives. However, if section 525 is susceptible to such interpretations, I am glad of this clarification.

To summarize, §8 of the Perishable Agricultural Commodities Act, which authorizes the revocation of respondent Jarosz' license because of its flagrant and repeated violations of the Act, was not amended in any manner by the 1978 Bankruptcy law, and is not dependent upon any bankruptcy related considerations. To be sure that there could be no doubt about the matter, §525 of the 1978 Bankruptcy law was amended to expressly authorize the continuation of the Secretary's license revocation authority under the Perishable Agricultural Commodities Act, even where the proceeding involves debts dischargeable in bankruptcy. That is decisive of the issue here.

There is, however, a bit of legislative history relating to irrelevant amendments to §4 of the Perishable Agricultural Commodities Act upon which respondents rely. Specifically, respondents rely on the legislative history as to amendments to §4(a) and (e) of the Perishable Agricultural Commodities Act (7 U.S.C. §499d(a) and (e) (1979 Supp.)). The legislative history is from the Senate Report as to the 1978 Bankruptcy law, which states (S. Rep. No. 95-989, 95th Cong., 2d Sess. 160, reprinted in [1978] U.S. Code Cong. & Ad. News 5787, 5946):

Section 303

This section amends section 4 of the Perishable Agricultural Commodities Act by conforming it with policy contained in section 525 of the proposed bankruptcy code. It is amended to prohibit denial or revocation of a license *solely on the basis of the filing of bankruptcy petition*, without consideration of the factors that may have led to the bankruptcy. Under subsection (e), a license may be revoked in the event of bankruptcy if the circumstances surrounding the bankruptcy warrant. The section as amended does not prohibit consideration of financial responsibility in licensing determinations, but simply requires a deeper look than the fact of bankruptcy. (Emphasis added.)

In the first place, as shown above, respondent Jarosz' license is not being revoked "solely on the basis of the filing of bankruptcy petition," but, rather, to carry out the Secretary's regulatory authority. If respondent Jarosz had never filed for bankruptcy, its license would have been revoked for the violations found here.

Moreover, §4 of the Act, involved in the two amendments referred to in the foregoing legislative history, is not the basis for the present action. The present action is under §8 of the Act (7 U.S.C. §499h(a)), based on violations of §2 of the Act (7 U.S.C. §499b).

The first amendment involved in the foregoing legislative history re-

lates to §4(a) of the Act. Prior to the 1978 amendments, §4(a) provided: "That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt." The 1978 amendments added, following the word bankrupt, "unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination" (7 U.S.C. §499d(a) (1979 Supp.)).

Prior to the 1978 amendment, the license of a bankrupt licensee terminated automatically under §4(a) even if no PACA violations had occurred. For example, prior to 1978, the license of a broker who handled no funds, a commission merchant who handled other person's funds faithfully, or a dealer who paid all his produce sellers would have terminated automatically upon bankruptcy even though there were no violations of the Perishable Agricultural Commodities Act. Section 4(a), as amended in 1978, gives the Secretary discretionary authority not to terminate a bankrupt's license in appropriate circumstances.

However, since the present action is not based on the automatic termination of respondent Jarosz' license under §4(a) because of its bankruptcy, the legislative history as to §4(a) is not relevant here.

The second amendment involved in the legislative history relied on by respondents relates to §4(e) of the Act. Under §4(e) of the Act, as amended in 1978, the Secretary may refuse to issue a license in the following circumstances (7 U.S.C. §4d(e) (1979 Supp.)):

(e) Refusal of license

The Secretary may refuse to issue a license to an applicant if he finds that the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock has, within three years prior to the date of the application, been adjudicated or discharged as a bankrupt, or was a general partner of a partnership or officer or holder of more than 10 per centum of the stock of a corporation adjudicated or discharged as a bankrupt, *and if he finds that the circumstances of such bankruptcy warrant such a refusal*, unless the applicant furnishes a bond of such nature and amount as may be determined by the Secretary or other assurance satisfactory to the Secretary that the business of the applicant will be conducted in accordance with this chapter. (Emphasis added.)

The emphasized words were added by the 1978 Bankruptcy law. "ever, the Secretary has taken no action against respondent Packers, Inc., under §4(e) of the Act. Respondent Custom F.

Inc., was not refused a license because respondent Jarosz or anyone else was adjudicated or discharged as a bankrupt. Rather, Custom Packers, Inc., was refused a license under §4d of the Act (7 U.S.C. §499d(d)) because John J. Jarosz, its President and 50% stockholder was the individual responsible for the violations of respondent Jarosz (see *§V, infra*). Accordingly, §4(e) of the Act is not involved here, and the legislative history as to the amendment to §4(e) is irrelevant.

For the foregoing reasons, there is no basis in the Perishable Agricultural Commodities Act or its legislative history, or the 1978 Bankruptcy law or its legislative history, for respondents' contention that the exercise of the Secretary's authority to revoke under §8 of the Perishable Agricultural Commodities Act is dependent upon the exercise of his discretion under §4(a) of the Act to determine whether the circumstances of a bankruptcy warrant the automatic termination of a license solely because of the bankruptcy.

V.

Under §4(d) of the Act (7 U.S.C. §499d(d)), the Secretary may withhold the issuance of a license to a corporate applicant if he finds it unfit to engage in the business of a commission merchant, dealer or broker because an officer or holder of more than 10% of its stock engaged in any practice of the character prohibited by the Act. Specifically, §4(d) provides (7 U.S.C. §499d(d)):

(d) Withholding license pending investigation

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show

Cite as 42 A D 1505

cause why the license should not be refused. *If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.* (Emphasis added.)

In the present case, a license should not be issued to respondent Custom Packers, Inc., since John J. Jarosz, its President and 50% stockholder, was also President and 50% stockholder of respondent Jarosz, and was directly and personally involved in respondent Jarosz' violations. Accordingly, a license should be denied to respondent Custom Packers, Inc., under §4(d) of the Act (7 U.S.C. §499d(d)). *See In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (Aug. 31, 1983); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1181, 1133-53 (1981); *In re Davila*, 36 Agric. Dec. 696, 697-704 (1977) (corporate veil of applicant's prior firm pierced to show that applicant had previously committed violations); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 242-45, 269-70 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

ORDER

The license of Jarosz Produce Farms, Inc., respondent herein, is hereby revoked.

The application of Custom Packers, Inc., respondent herein, for the issuance of a license, is hereby denied.

This order shall become effective as to each respondent on the 30th day after service on such respondent.

APPENDIX

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974)
U.S.D.A. Sanction Policy. [Excerpt omitted.-Ed.]

(No. 22,911)

In re: JOE COPPOLA, d/b/a ALL UNITED FRUIT PRODUCE CO. PACA
Docket No. 2-6235. Decided August 30, 1983.

Application for license, responsibly connected person—Application for license granted.

Respondent had previously been responsibly connected with a corporation which had been found to have committed violations of the Act. Complainant refused to issue a license based solely on respondent's past violations of the Act. Based on respondent's testimony and his current status, it is determined that he is now fit to be licensed under the Act. Therefore respondent's application for license was granted.

Edward M. Silverstein, for complainant.
R. Bruce Minta, West Covina, California, for respondent.

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a Notice to Show Cause proceeding instituted pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter called the "Act" or "PACA"), the regulations promulgated pursuant to the Act (7 CFR 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By the Secretary (7 CFR 1.130 through 1.151; hereinafter the "Rules of Practice"). The proceeding was instituted by a Notice to Show Cause filed on April 1, 1983, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the Notice to Show Cause that Joe Coppola, (hereinafter "Coppola" or "respondent"), who previously had been responsibly connected with a corporation which had been found to have committed willful, flagrant and repeated violations of the PACA, was unfit for the issuance of a PACA license.¹

Respondent filed an answer, on April 18, 1983. The answer denied,

¹Having notified the complainant that respondent would waive its defenses, a default decision and order was entered. The corporation's violations resulted from its failure to account truly and correctly in the amount of \$134,944.46 to seven sellers for which it had, as a broker, invoiced, and collected from various buyers for 85 lots of fruit sold in interstate commerce from April 1976 through July 1976. The corporation was also found to have misrepresented the selling price of 11 lots of fruit sold to four buyers by quoting them higher prices than those authorized by the seller, collected the higher prices, and retained the difference of \$1,357.00 for itself. See, *Joe Coppola & Co.*, 37 Agric. Dec. 1281 (1978).

among other things: that the prior acts were willful or flagrant; misrepresenting selling prices to buyers and retaining the difference between the actual and represented prices (Tr 37, 51-52); and that the applicant is unfit to engage in business as a broker.

An oral hearing was held on April 26, 1983, in Los Angeles, California. Complainant was represented by Edward M. Silverstein, Esq., Office of the General Counsel, U.S. Department of Agriculture, Washington, D.C. 20250. Respondent was represented by R. Bruce Minto, Esq., Mattier, Annigian & Minto, Inc., 1500 West Covina Parkway, West Covina, California 91790. At the close of the hearing the time was fixed for the filing of briefs.

Pertinent Statutory Provisions

1. Sec. 2 (7 USC 499b)

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce

* * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction;

Sec. 4 (7 USC 499d)

(a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this Act, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with this Act,—

(b) The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 8 within two years prior to the date of the application or whose license is currently under suspension;

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect;

(C) within two years prior to the date of the application, has been found guilty in a Federal court of having violated the provisions of the Act of March 3, 1927 (7 U.S.C. 491-497), relating to the prevention of destruction and dumping of farm produce; or

(D) has failed, except in the case of bankruptcy and subject to his right of appeal under section 7 (c), to pay any reparation order issued against him within two years prior to the date of the application;

(e) Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this Act and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 7(c). In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an in-

creased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided;

(d) The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal Court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violations of the (PACA) by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

Sec. 8 (7 USC 499h)

(a) Whenever (a) the Secretary determines as provided in section 6 that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, the Secretary

may publish the facts and circumstances of such violation and/or, by order, suspend the license of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Pertinent Regulations—7 CFR Part 46

Sec. 46.2(aa).

'Full payment promptly' is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. 'Full payment promptly,' for the purpose of determining violations of the Act, means:

* * * * *

(6) Payment to growers, growers' agents, or shippers by* brokers, who are selling for the account of a grower, growers' agent, or shipper and are authorized to collect from the buyer or receiver, within 5 days after the agent or broker receives payment from the buyer or receiver;

* * * * *

Sec. 46.28

(c) Broker's responsibility for payment. In the absence of a specific agreement, a broker is not responsible for payment to the seller by the buyer. Agreement to collect from the buyer and remit to the seller is not a guarantee by the broker that the buyer will pay for the produce purchased, unless there is a specific agreement by the broker that he will pay if the buyer does not pay. A broker who agrees to collect funds from the buyer for his principal shall render an itemized accounting to the principal promptly on receipt of payment showing the true gross selling price, all brokerage fees deducted and all expenses including auction charges, incurred in connection with the sale of the shipment. The failure to account truly and correctly and make full payment promptly is a violation of the act. While the broker is not obliged to furnish his principal information regarding the financial condition of the buyer, if the broker furnishes such information, he must truthfully report the information available to him, and any false or misleading statements for a fraudulent purpose to the principal to encourage the sale will be a violation of the act. A buying broker who negotiates a purchase in his own name under an agreement with his principal, is responsible for payment of the purchase price to the

seller. A broker has no authority to grant allowances or adjust the seller's invoice price to the buyer without the specific prior approval of his principal.

Sec. 46.83

Any licensee who collects or receives funds for or on behalf of another person or firm in connection with produce shall not make any use or disposition of such funds in his possession or control that will endanger or impair faithful and prompt payment to the owner or consignor of the produce or to any other person having a financial interest therein.

FINDINGS OF FACT

1. Respondent, Joe Coppola, d/b/a All United Fruit & Produce Co., is an individual, whose address is 741 So. Central Avenue, Room 223, Los Angeles, California 90021.

2. During the period April 1976 through July 1976, Joe Coppola was the president, director and 100% stockholder of Joe Coppola & Co., Inc., a California corporation which was a licensee under the PACA, and whose mailing address was 926 S. Stanford Avenue, Los Angeles, California 90021.

3. The Director, Fruit and Vegetable Division, Agricultural Marketing Service, on December 30, 1977, initiated a disciplinary proceeding, pursuant to Section 8 of the PACA, (7 U.S.C. 499h), against Joe Coppola & Co., Inc., for violations of Section 2 of the PACA (7 U.S.C. 499b), which was assigned PACA Docket No. 2-4886.

4. By Order effective August 11, 1978, Joe Coppola & Co., Inc., was found to have committed willful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. 499b), by failing to account truly and correctly in the amount of \$184,944.46 to seven sellers for which it had, as a broker, invoiced and collected from various buyers for 85 lots of fruit sold in interstate commerce from April 1976 through July 1976. It also was found to have misrepresented, from April 1976, through July 1976, the selling prices of 11 lots of fruit sold to four buyers by quoting and invoicing them at higher prices than those quoted by and authorized by the seller, collecting the higher prices, and retaining the difference of \$1,357.00 for itself.

5. Joe Coppola, as the sole stockholder, president and director of Joe Coppola & Co., Inc., during the period in which the violations cited in paragraph 4 occurred, was responsible for the commission of the violations of the PACA. These acts constitute practices of the character prohibited by the Act.

6. The Act does not bar forever an applicant for a license whose license

(or one responsibly connected with the former licensee), was previously revoked.² Section 4 (b), (c) of the Act provides for a mandatory waiting period and certain conditions to be fulfilled before application by a former licensee.³ Section 4 (d), which is applicable here, is permissive and sets forth the circumstances in which the Secretary *may* withhold the issuance of a license.

7. There are no published guides or standards to be utilized in determining when a former licensee (or one responsibly connected) is fit for a license under the terms of Section 4(d). The standard applied by complainant here is whether respondent is "able to demonstrate that he could abide by the fair trading practices."⁴

8. Because of respondent's affiliation with Joe Coppola and Co., Inc., and the nature of the past violations, it was complainant's position that respondent would not abide by fair trading practices, and should not be granted a license. Complainant's witness testified that the company's failure to remit over \$135,000 to seven sellers collected as a broker to be one of the worst violations under the PACA. Complainant's initial refusal to issue a license was based solely on respondent's past violations of the Act. There was no investigation of the respondent current status.⁵

9. Respondent testified at length as to the past violations, his employment since the violations, and his present attitude and circumstances.

Respondent exercised bad business judgment in his dealings with buyers and sellers. Disputes rose over the quality of merchandise, and unwanted produce, and respondent absorbed losses incident to the disputes to retain the accounts. (Tr 45-48, 57-60).

In connection with respondent's broker operations, loads of produce were often divided by respondent for shipment to various purchasers. Each purchaser paid for that portion of the produce received and remitted payment by check to respondent. Such checks were placed in the company's general account until all payments were received for the entire load of produce. Respondent thereafter sent one check to the grower for the entire load of produce. As company losses increased, respondent used money in the company fund to pay the earlier debts while payments for recent transactions were delayed. (Tr 73-76).

The losses accumulated and efforts by respondent to work out a plan for delayed payment to growers resulted in the filing of an involun-

² Tr 20.

³ Tr 21.

⁴ Tr 20-22.

⁵ Tr 17-18, 28.

tary bankruptcy petition by three growers. Bankruptcy proceedings lasted about 2 years and respondent was finally discharged. The growers received about 27% of the \$78,000 collected by the Trustee. (Tr 48-55).

Coupled with respondent's business failures were personal problems: illness of his former wife, divorce, and subsequent care of his five children. (Tr 52).

Since 1976 respondent has held several positions. He attended a mortgage banking school and obtained a license from the federal government to make loans for HUD. He was a mortgage broker for a period of three years in which he regularly handled large sums of money.

Thereafter he again entered the fresh produce industry, holding various positions as a salesman, buyer, and broker. At present, respondent holds a brokers's license from the state of California. Respondent's business entity is capitalized at \$10,000 with a home equity of \$125,000 to \$150,000 to be pledged to the company (Tr 65-83).

CONCLUSIONS

Based upon the record evidence in this case it is concluded that respondent is fit to engage in the business of a broker under the Act, and his license application should be granted.

In re *Ludwig Casca*, 34AD 1917 which is cited by complainant, weighs heavily in favor of complainant's position that respondent's license application should be denied. Both the present respondent and Ludwig Casca were responsibly connected persons with the former licensees which had violated the Act. This case and *Casca* are similar in many respects.

In the *Casca* proceeding, the Judicial Officer, in construing Section (d) of the Act, regarding burden of proof stated, at pages 1936-193'

"The complainant contends that under the permissive provisions of §4(d) involved in this case (7 U.S.C. 499d(d)), once the complainant carries the burden of proving that the applicant has engaged in a practice of the character prohibited by the Act, the respondent then has the burden of proving that he is fit to engage in the business of a commission merchant, dealer, or broker. The statutory language supports the complainant's contention. But see *In re Allied Prod. Dist. Co.*, 15 Agriculture Decisions 673, 676, (1956). Specifically, the Act states that if "after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused"

(emphasis supplied; 7 U.S.C. 499(d)). The Act does not state that the hearing is to show cause why the license should not be issued."

At page 1929 of the *Casca* decision the Judicial Officer also found:

"The complainant proceeded to establish, through the testimony of Robert M. Grainger, who investigated the case, a *prima facie* case (see Findings 3, 4, and 5, *supra*) which compels me to infer that in at least most of the 93 violations referred to in Finding 3, *supra*, respondent Ludwig Casca deliberately and intentionally caused National Produce Company to under-pay the shippers in the consignment transactions.

To give the respondent the benefit of the doubt, if may be that in some instances the violations were not intentional; but in view of the large number of violations and the manner in which the respondent handled the consignment transactions, I infer that at least most of the violations resulted from the respondent's intentional misconduct.

The evidence giving rise to this inference is supported by the fact that the respondent Ludwig Casca was present at the hearing but did not testify or offer any evidence to rebut the evidence by complainant which established a *prima facie* case of respondent's intentional misconduct. *The respondent's failure to testify, in the light of the serious evidence introduced against him by complainant, gives rise to the inference that his testimony, if offered, would have been adverse to himself.* (emphasis added)

Here however, unlike the *Casca* case, respondent testified about the circumstances leading to the past violations by his corporation (see finding of fact 9). From his testimony it is concluded that the violations were not intentional misconduct.

In arriving at the conclusions herein I have not overlooked the purposes of the Act as stated in complainant's brief or the numerous authorities cited therein relating to respondent's prior violation of the Act. I am aware too of the strict policy of the Judicial Officer that all excuses are routinely rejected in determining whether payment violations occurred. *Finer Foods Sales Co., Inc., v. Block* 708 F2d 277, 781-782, (CADC, 1983).

However the setting here is different from that of a disciplinary action brought to determine an initial violation of the Act. That respondent violated the Act in 1976 is not in controversy.

What is to be resolved here is whether respondent is now fit to be

licensed under the Act. Thus the conclusion herein must represent a judgment of 1983 and not a prophecy of 1976, *cf., Morgan v. U.S.* 313 US 409, 414-416.

Throughout his testimony I was impressed by respondent's demeanor, sincerity, and candor. His testimony was credible. He acknowledged his past violations of the Act, and believes that the experience gained from his past failures will enable him to function successfully in the future. (Tr 61-62).

Respondent had been in the produce business at the time of the violation approximately 27 years, and was a broker approximately 5 years before the violation of the Act. His experience in the industry is diverse and except for the prior violations for which his license was revoked, there had been no prior complaints or disciplinary proceedings.

In explanation of the violations occurring in 1976, respondent offered that the violations occurred as a result of losses forced upon his company by customers who shipped unwanted produce and inferior produce, for which the company suffered substantial losses. At the same time, respondent's wife was having significant medical and psychological problems and he was undergoing a divorce.

Since 1976 respondent has held numerous jobs, including that of a mortgage broker and other positions involving him personally handling large sums of money. Respondent has satisfactorily handled such positions without any subsequent problems.

At the present time respondent is employed as a intrastate produce broker and is fully licensed by the State of California. As such his duties again involve the handling of money and there have been no complaints or disciplinary proceeding brought alleging any violations of his fiduciary position.

Finally, respondent made efforts to repay monies involved with the prior violation, going so far as to liquidate and encumber his personal assets (Tr 54).

For the foregoing reasons respondent's license application should be granted.

ORDER

Respondent's application for license is granted.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.145 of the Rules of Practice (7 CFR 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final October 7, 1983.—Ed.]

(No. 22,912)

In re: WEBB-DAVIS FRUIT CO., INC. PACA Docket No. 2-6201. Decided September 6, 1983.

Reparation orders remaining unpaid—Failure to pay promptly—Publication of the facts—Default.

Edward M. Silverstein, for complainant.
Respondent, *pro se*

Decision by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "PACA," instituted by a complaint filed on January 28, 1983, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period July 1981 through December 1981, respondent purchased and accepted, in interstate and foreign commerce, from five sellers, 35 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$64,469.80. In addition, it was alleged that respondent failed to pay four sellers for 36 lots of perishable agricultural commodities, received and accepted in interstate commerce, in the total amount of \$71,984.31. These transactions were the subject of reparation orders issued by the Secretary which reparation orders remain unpaid.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 CFR 1.139).

FINDINGS OF FACT

1. Respondent, Webb-Davis Fruit Co., Inc., is a corporation, whose address is Drawer D' Ats, Midland, Texas 79701.

2. On June 21, 1978, PACA license No. 7816643 was issued to the Webb-Davis Fruit Co., Midland, Texas, a partnership of Allen B. Dorsey, Nolan W. Dorsey and Virginia B. Dorsey. On or about December 21, 1980, an eighty percent interest in the partnership was sold to Solatrex, Inc. On this sale, a new partnership was formed, and the PACA license of the old partnership became a nullity. On or about July 3, 1981, this new partnership was incorporated as Respondent, Webb-Davis Fruit Co., Inc.

3. Respondent is not, and never has been, licensed under the PACA. From July 1981, through December 1981, it carried on the business as a commission merchant, dealer or broker as those terms are defined in Section 1 of the PACA 9 & U.S.C. 499a) and was, therefore, subject to the licensing provisions of the PACA during the time of the transactions alleged herein.

4. During the period July 1981 through December 1981, respondent purchased and accepted in interstate and foreign commerce from five sellers, 35 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$64,469.80.

5. In addition, during the period June 1981 through December 1981, respondent purchased and accepted in interstate and foreign commerce from four sellers, 36 lots of fruits and vegetables, all being perishable agricultural commodities, which transactions were the subject of four formal reparation complaints filed against respondent. These complaints resulted in reparation orders being issued against respondent as provided in section 7 of the PACA, (7 U.S.C. 499g), which reparation orders remain unpaid.

CONCLUSIONS

Respondent's failure to make full payment promptly with respect to the 71 transactions set forth in Findings of Fact Nos. 4 and 5, above, constitute willful, repeated and flagrant violations of Section 2 of the PACA (7 U.S.C. 499b), for which the Order below is issued.

ORDER

A finding is made that respondent has committed willful, flagrant repeated violations of Section 2 of the PACA (7 U.S.C. 499b), and facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under PACA, this Decision will become final without further proceeding.

days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in 1.139 and 1.145 of the Rules of Practice (7 CFR 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final October 25, 1983.-Ed.]

REPARATION DECISIONS

(No. 22,913)

GROWERS EXCHANGE, INC. v. CUMBERLAND PRODUCE CO., INC. PACA
Docket No. 2-6101. Decided September 6, 1983.

Contract term, no grade—Weight of commodity.

In a no grade contract for the delivery of lettuce, the weight of the cartons is not a factor in determining whether the load made good delivery.

Andrew Y. Stanton, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 CFR 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,337.50 in connection with a trucklot of lettuce shipped in the course of interstate commerce.

A copy of the report of investigation prepared by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, complainant filed an opening statement and a brief. Respondent did not submit any additional evidence or a brief.

FINDINGS OF FACT

1. Complainant, Growers Exchange, Inc., is a corporation whose address is P.O. Box 80479, Salinas, California.

2. Respondent, Cumberland Produce, Inc., is a corporation whose address is P.O. Box 25025, Nashville, Tennessee. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On December 28, 1981, complainant sold to respondent 550 cartons of lettuce at \$13.50 per carton plus \$.65 per carton for cooling and \$22.50 for a Ryan recorder for a total price of \$7,805.00, f.o.b. The contract specified that no grade was to be in effect, but good delivery standards

were applicable, excluding bruising and/or discoloration following bruising. Warren M. Freedgood, Carmel, California acted as the broker.

4. On December 28, 1981, complainant shipped the lettuce to respondent by truck, in interstate commerce, where it arrived on approximately December 31, 1981, and was accepted by respondent.

5. On December 31, 1981, respondent obtained a federal inspection of the lettuce which revealed as follows, in relevant part:

Products Inspected: Iceberg type LETTUCE in cartons printed "Toro 2 Doz. Heads, Wrapped Lettuce, Produce of U.S.A., Growers Exchange, Inc., Salinas, Calif." Applicant states 450 cartons.

Condition of Load: Stacked on pallets at above location.

Condition of Pack: Fairly tight. Place packed. Heads individually film wrapped. Net Weight per carton ranges from 27 $\frac{1}{4}$ to 31 $\frac{1}{4}$, average 29 $\frac{1}{2}$ lbs. Tare weight 3 $\frac{1}{4}$ lbs.

Temperature of Product: In various cartons 39 to 45°F.

Remarks: Inspection and certificate restricted to net weight only at applicant's request.

6. Respondent has, to date, paid complainant \$5,467.50, which is \$2,837.50 less than the amount alleged by complainant to be due and owing.

7. A formal complaint was filed on June 28, 1982, which was within nine months from the time the cause of action herein accrued.

CONCLUSIONS

There is only one issue in dispute between the parties. Respondent claims that the lettuce was too light in weight, as the weight called for in the Department's regulations (7 CFR 51.2517) is from 42 to 50 pounds per container, and the December 31, 1981, federal inspection showed that the lettuce weighed from 27 $\frac{1}{4}$ to 37 $\frac{1}{4}$ pounds per carton, averaging 29 $\frac{1}{2}$ pounds. It was solely on this basis that respondent withheld the \$2,837.50 in dispute. Complainant argues that the lettuce was not required to meet any weight standards since the contract specifically excluded grade factors.

Respondent's claim is without merit. The regulation on which it relies is located within subpart 51, entitled United States Standards for Grades of Lettuce. These standards do not apply to lettuce that is not required to be of any particular grade, as in the instant case. This is further indicated by the introductory language of 7 CFR 5.2517, "(a) The following weight requirements may be used in connection with grade." (Underscoring added.) There are thus no weight requirements for lettuce when the contract explicitly states that grade factors are not applicable.

Respondent is, therefore, liable for the entire contract price of \$7,805.00,

less the \$5,467.50 already paid, or \$2,337.50. Its failure to pay this amount is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$2,337.50, with interest thereon at the rate of 13 per cent per annum from February 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,914)

LET-US-PAK v. DAN GARCIA BROKERAGE, INC PACA Docket No. 2-6357. Decided September 6, 1983.

Admission of liability.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$6,751.50 in connection with 2 shipments of lettuce in interstate and foreign commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Let-Us-Pak is a partnership composed of Budd Hitchcock, Thomas L. Hitchcock, Paul Sanchez, Joseph A. Russo, and Ronald Wesley whose address is P.O. Box 225, Salinas, California 93902. Respondent, Dan Garcia Brokerage, Inc., is a corporation whose address is P.O. Box 999, Nogales, Arizona 85621. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$6,751.50. Accordingly, within 30 days from the date of this order, respondent shall

pay to complainant, as reparation, \$6,751.50, with interest thereon the rate of 13 percent per annum from April 1, 1983, until paid.

Copies of this order shall be served upon the parties.

(No. 22,915)

MARTORI BROS. DISTRIBUTORS v. DAN GARCIA BROKERAGE, INC. PACI
Docket No. 2-6358. Decided September 6, 1983.

Admission of liability.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$7,256.90 in connection with 16 shipments of lettuce in interstate and foreign commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. Accordingly, the issuance of an order without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Martori Bros. Distributors is a partnership composed of Anthony F. Martori, Edward J. Martori, Stephen A. Martori, Arthur J. Martori Estate, and Arthur J. Martori, Jr., whose address is 650 North Scottsdale Road, Scottsdale, Arizona 85253. Respondent, Dan Garcia Brokerage, Inc., is a corporation whose address is P.O. Box 99, Nogales, Arizona 85621. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$76,256.90. Accordingly, within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$76,256.90, with interest thereon at the rate of 13 percent per annum from January 1, 1983, until paid.

Copies of this order shall be served upon the parties.

(No. 22,916)

DAVE KINGSTON PRODUCE, INC. *v.* SA-SO POULTRY SALES CO., INC.
a/t/a VALENTINE FOODS. PACA Docket No. 2-6230. Decided September
12, 1983.

Price adjustment, claimed credit.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Robert G. Bauer, Philadelphia, Pennsylvania, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930 as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$19,508.25 in connection with the sale and shipment of two truckloads and one carlot of potatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an unsworn answer thereto, admitting liability to the complainant in the total amount of \$18,908.25, and denying liability to the complainant in the amount of \$600.00. Although the amount claimed as damages in the formal complaint exceeds \$15,000.00, neither party requested an oral hearing. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Neither party did so. Neither did either party file a brief.

FINDINGS OF FACT

1. Complainant, Dave Kingston Produce, Inc., is a corporation whose address is P.O. Box 158, Ucon, Idaho.

2. Respondent, Sa-So Poultry Sales Co., Inc., is a corporation also trading as Valentine Foods, with an address at 609 N. American Street, Philadelphia, Pennsylvania. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about August 24, 1982, complainant sold to respondent, f.o.b., a truckload of U.S. No. 1 Idaho potatoes for a total invoice price of

\$6,820.75. There were 191 fifty pound cartons of U.S. No. 1 size, 80 count, at \$11.00 each, for a total price of \$2,101.00; 167 fifty pound cartons of U.S. No. 1 size, 110 count, at \$7.75 each, for a total price of \$1,294.25; and 442 fifty pound cartons of U.S. No. 1 size, 20 count at \$7.75 each, for a total price of \$3,025.50. The truckload of potatoes was shipped from loading point in Idaho to Philadelphia, Pennsylvania, where it was received and accepted by respondent.

4. On or about September 15, 1982, complainant sold a carlot of potatoes to respondent, f.o.b., for a total invoice price of \$3,712.50. There were 200 fifty pound cartons of U.S. No. 1 size, 120 count, at \$10.25 each, for a total price of \$2,050.00; 100 fifty pound cartons of U.S. No. 1 size, 100 count, at \$10.75 each, for a total price of \$1,075.00; and 50 fifty pound cartons of U.S. No. 1 size, 90 count, at \$11.75 each, for a total price of \$587.50. The carlot was shipped from loading point in Idaho to Philadelphia, Pennsylvania, where it was received and accepted by respondent.

5. On or about October 15, 1982, complainant sold to respondent a truckload of potatoes, f.o.b., for a total invoice price of \$6,075.00. The truckload contained 500 fifty pound cartons U.S. No. 1 size, 120 count, at \$5.50 each, for a total price of \$2,750.00; 150 fifty pound cartons of U.S. No. 1 size, 80 count, at \$8.50 each, for a total price of \$1,275.00; 175 fifty pound cartons of U.S. No. 1 size, 70 count, at \$8.50 each, for a total contract price of \$1,487.50; and 75 fifty pound cartons of U.S. No. 1 size, 50 count at \$7.50 each, for a total price of \$562.50. The potatoes were shipped from loading point in Idaho to respondent in Philadelphia, Pennsylvania, where they were received and accepted by respondent.

6. Respondent claimed that with respect to the shipment made on or about August 24, 1982, it was entitled to a \$600.00 credit. However, respondent failed to submit any evidence which would substantiate its claim.

7. A formal complaint was filed on December 27, 1982, which was within nine months of the date of the causes of action herein arose.

CONCLUSIONS

There is in issue in this proceeding only \$600.00 which respondent claims it is due as a credit on one of the three shipments of potatoes involved in this case. However, respondent has submitted no evidence to indicate that complainant ever gave it any credit in any amount with respect to the transaction which occurred on or about August 24, 1982. Respondent has admitted that it owes the remaining \$18,908.25 involved in this proceeding. Based upon the sworn documentation of complainant

and the unsworn answer of respondent, which unsworn answer does not have evidentiary value, we conclude that complainant has carried its burden of proof that it sold and shipped U.S. No. 1 Idaho potatoes to respondent in interstate commerce in the total amount of \$19,508.25, which shipments were received and accepted by respondent. Respondent is liable to complainant for the full purchase price of the three shipments. Respondent's failure to pay to complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant as reparation that \$6,820.75, with interest thereon at the rate of 13 per cent per annum from October 1, 1982 until paid.

Within 30 days from the date of this order respondent shall pay to complainant, as reparation \$3,712.50, with interest thereon at the rate of 13 per cent annum from October 1, 1982, until paid.

Within 30 days from the date of this order respondent shall pay to complainant, as reparation \$6,075.00, with interest thereon at the rate of 13 per cent per annum from November 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,917)

WALTERS PRODUCE, INC. *v.* FRANCIS PRODUCE COMPANY. PACA Docket No. 2-6026. Decided September 15, 1983.

Improper rejection—Inspection, limited—Damages, failure to prove.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$15,746.94 in connection of the sale of a carload of potatoes in interstate commerce.

Copies of the report of investigation made by the Department were

served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer and counterclaim thereto, denying liability to the complainant, and claiming damages in the amount of \$15,746.94. Although the amount claimed as damages in both the formal complaint and the counterclaim exceeded \$15,000.00, the shortened method of procedure provided in Section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable because neither party requested that an oral hearing be held. Under this procedure the verified pleading of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an answer to the counterclaim and a brief. Respondent filed an answering statement, a petition to reopen which was granted and a brief, which it subsequently amended.

FINDINGS OF FACT

1. Complainant, Walters Produce, Inc., is a corporation with a business address of P.O. Box 36, Newdale, Idaho. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Francis Produce Company, is a partnership composed of Anthony G. Francis and Joseph G. Francis, with a business address of 3048 White Horse Road, Greenville, South Carolina. At the time of the transaction involved herein respondent was licensed under the Act.

3. On June 2, 1981, complainant sold to respondent a carload of U.S. No. 1 potatoes, f.o.b. The carload contained 1,100 bales, each bale containing 10 five lb. bags at a contract price of \$16.50 per hundredweight, for a total price of \$9,075.00. In addition the carload contained 1,100 bales, each bale containing five 10 lb. bags at a contract price of \$14.50 per hundredweight for a total price of \$7,975.00. Complainant paid the freight for shipment in the total amount of \$5,105.63 bringing the total price to be received from respondent under the contract to \$22,155.63.

4. On or about June 2, 1981, the potatoes were subjected to a shipping point inspection, where they were found to grade U.S. No. 1. On June 3, 1981, the potatoes were shipped from Idaho to Greenville, South Carolina, where they were placed at respondent's warehouse at 10:30 a.m. on June 9, 1981. At about 10:00 a.m. on June 10, 1981, respondent was notified by the railroad that the potatoes had been placed. Respondent began to unload the car at 7:00 a.m. on June 11, 1981, and found rotten potatoes at the door.

5. Upon finding rotten potatoes at the door respondent immediately sought to secure a federal inspection, but could not reach anyone at the inspector's office on June 11, 1981. Respondent did not notify complain-

ant that it was rejecting the potatoes or that it had sought a federal inspection, but could not get it. On June 12, 1981, respondent secured a federal inspection. Such inspection showed in pertinent part as follows:

Products Inspected:	LONG RUSSET POTATOES in mesh bags printed "Newdale Brand Idaho Potatoes, U.S. NO. 1, Packed In Idaho, Walters Produce, Inc., Newdale, Idaho 83436, Produce of U.S.A., Grown in Idaho, 5 Lbs. or 10 Lbs. Net Wt.," placed in paper bags printed "Newdale Brand Idaho Potatoes, U.S. NO. 1., Packed in Idaho By H. Schwendiman, Newdale, Idaho, Produce of U.S.A., Contents 5-10 Lb. Bags or 10-5 Lb. Bags." Manifested as 2200 Master Bags.
Condition Load:	Throughload, 4 or 5 Rows, 14 or 15 Layers, Quality: Mature, fairly clean, fairly bright to bright, fairly well to well shaped. Grade defects average 2% old shatter bruises, growth cracks and misshapen.
Condition:	Generally firm. In many samples none, in most of samples, range from 2 to 4%, average 2% damage by dry tape Fusarium Tuber Rot. In 30% of samples none, In 70% of samples 5 to 7%, average 4% bacterial Soft Rot in various stages.
Grade:	Meets quality requirements but fails to grade U.S. NO. 1 2 Inch or 4 Oz. minimum only account condition.
Remarks:	Inspection and certificate restricted to portion of load between door and upper 2 layers of 2 Stacks each side of door. This certificate supercedes certificate NO. E 172865.

6. Respondent, having failed to notify complainant either that it was rejecting the load within 24 hours of being notified by the railway that the carload had been placed, or that it was seeking but had failed to secure a federal inspection within that time, accepted the produce.

7. Complainant was notified that respondent had rejected the load of potatoes on June 12, 1981, by the broker in this matter Hubert H. Nall Company, Inc., Forest Park, Georgia. Initially complainant accepted respondent's rejection, and sought to have the potatoes handled for its account by respondent. Respondent declined to do so, but helped complainant find an alternative receiver, Brand Brothers, to handle the potatoes for complainant's account. Subsequently, complainant discov-

ered that the potatoes had not been inspected until three days after they arrived, and notified respondent that it repudiated the prior rejection of the potatoes.

8. Brand Brothers handled the potatoes for complainant's account, and remitted to it \$6,408.69.

9. A formal complaint was filed on February 9, 1982, which was within nine months of the time of the cause of action involved herein arose. A timely counterclaim was filed by the respondent on May 7, 1982.

CONCLUSIONS

This proceeding arises as a result of a series of events which led to a carload of potatoes being wrongfully rejected by respondent as a result of its misunderstanding as to its obligations under the PACA regulations. In this case the parties entered a contract for the sale and delivery, f.o.b., of a carload of potatoes consisting of 1,100 bales, each such bale containing 10 five pound bags, at \$16.50 per hundredweight, and also 1,100 bales consisting of five 10 pound bags at \$14.50 per hundredweight, for a total contract price of \$17,050.00. In addition, complainant paid the freight for the benefit of respondent in the amount of \$5,105.63, for a total obligation by respondent to complainant of \$22,155.63. The evidence is clear that complainant loaded the potatoes aboard a railroad car, but at the end of the loading cycle put some potoatoes from a bin of low quality potatoes near the door of the car. Thereafter, respondent, when it began to unload the railroad car noticed that the potatoes near the door appeared not to be U.S. No. 1. It immediately sought inspection by a federal inspector, but could not attain it in a timely fashion. When it did so, it only had a small portion of the total load of potatoes inspected. Respondent's delay in notifying complainant that it wished to reject the load, and the fact that it had a partial inspection which cannot be said to reflect the condition of the entire load, is fatal to its defense and counterclaim.

The pertinent times and dates during which these matters occurred begin with the arrival of the railroad car and its placement at respondent's siding on March 9, 1981 at 10:30 a.m. It was not until a day later, probably around 10:00 a.m., that the railroad notified respondent that the car had been place. Pursuant to 7 CFR 46.2(bb)(2) a receiver rejects produce without reasonable cause when it fails to advise "the seller, shipper, or his agent that produce, complying with the contract will not be accepted." Pursuant to 47 CFR 46.2(cc) "reasonable time" is "(2) For fresh fruits and vegetables with respect to rail shipments, not to exceed 24 hours after notice of arrival and the car has been placed in a location where the produce is made accessible for inspection . . ." In this case

respondent was notified that the car had been placed in a location where the product was accessible for inspection or unloading at about 10:00 a.m. on June 10, 1981. As is stated in 7 CFR 46.2(dd)(3) acceptance is "Failure of the consignee to give notice of rejection to the consignor within a reasonable time as defined in paragraph (cc) of this section." Therefore, respondent had an obligation, if it were going to reject the produce, to notify complainant of its intention to do so no later than 10:00 a.m. on June 11, 1981. The evidence in this case is clear that respondent did not give notice to complainant of its intention to reject the goods until June 12, 1981, when it did so through the broker, Hubert H. Nall Company.

If there had been a timely rejection, the burden of proof would be on complainant to show that the potatoes involved made good delivery. However, since there was not a timely rejection, the burden of proof is on the respondent to show that there was not good delivery. *Rocky Ford Distributing Co. v. Angel Produce Co.*, 29 Agric. Dec. 93 (1970). Unfortunately for respondent, it failed to carry its burden of proof in this regard. Respondent attempted to show that the potatoes were not U.S. No. 1 at destination by an inspection of a portion of the load on June 12, 1981. The inspection certificate stated that the inspection was "restricted to portion of load between door and upper 2 layers of 2 stacks each side of door.", (200 bales). Such limited inspection clearly was not large enough to constitute an inspection of anywhere near one-half of the load of potatoes involved. The inspection of less than one-half of a load lacks probative value as to the condition of a full load of a commodity. A restricted inspection is not sufficient to show the condition of goods under these circumstances. *Macio Saikhon v. Russell-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975); *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359, 1363 (1979). Thus, while there is no question that an average of about 5% of condition defects of the portion of the load of potatoes that was inspected shows that that portion did not grade U.S. No. 1, such limited inspection is not sufficient to show that the entire load would not have made U.S. No. 1. For this reason we need not consider the subsequent inspection ordered by complainant on June 19, 1981, which showed that a small portion of the 2200 bales, or master bags, of potatoes on the load did make good delivery.¹

Neither does the fact that respondent could not secure an inspection

¹ The 600 master bags inspected at that time are, for the purposes of the record, insufficient to show the condition of the entire load of potatoes for the same reasons that the restricted inspection of the potatoes near the door on June 12, 1981, was insufficient.

within 24 hours of the time it was notified that the railroad car had been placed and it with respect to this wrongful rejection. 7 CFR 46.2(cc)(3) states in pertinent part that "If, within the applicable period, the receiver . . . applies for but cannot obtain Federal inspection before the end of this period, (i.e., 24 hours) and so notifies the consignor within the applicable period, the period shall be extended until . . . Federal inspection is made . . ." Respondent having been notified that the car was placed on June 10, 1981 at about 10:00 a.m., and not having had the goods inspected until June 12, 1981, with notification to complainant occurring at 11:00 a.m., on that date, allowed too much time to lapse to take advantage of this rule.

Initially complainant accepted a rescission of the contract on the part of respondent when it was notified of the results of the June 12, 1981, inspection. However, complainant repudiated this rescission shortly thereafter when it learned that the railroad car had been placed at respondent's place of business on June 9, 1981, with a three day lapse prior to inspection. Complainant was entitled to make such repudiation because it originally accepted the rescission based upon a mistake of fact as a result of respondent's failure to convey to it all pertinent information. *Martori Brothers, Distributors v. Onondaga Produce Co., Inc., et al.*, 27 Agric. 673 (1968).

Neither does the fact that respondent admitted that it put some poor quality potatoes in the doorway of the railroad car help respondent. The unrefuted explanation of complainant in this regard was that at the end of the run for bagging the potatoes, its employee accidentally placed some potatoes from a bin of questionable quality potatoes into the lot to be shipped to respondent. There is no indication of intentional wrongdoing in this regard. Indeed, it would seem that if there were any intentional wrongdoing it would hardly be likely that complainant would place the poorest quality bags of potatoes at the entrance to the car. Thus, respondent's alternative theories that there was a rescission of the contract or there was a breach of warranty by the complainant must fail because the facts are more supportive of the position that complainant originally rescinded the contract based upon a lack of full knowledge, and that there was no breach of warranty by complainant in putting a small quantity of poor quality potatoes on the railroad car since the inspection could not be said to be reflective of the quality of the entire railroad car.

Because of our conclusion above that respondent did not properly reject the potatoes it is liable for the full purchase price, including freight, less any damages it may have proved. Unfortunately for respondent it failed to prove any damages whatsoever because it did not

Cite as 42 A.D. 1559

submit any kind of accounting with respect to those potatoes which were not U.S. No. 1 which were stacked near the door of the railroad car. Complainant, after unsuccessfully attempting to negotiate with respondent to handle the potatoes for its account, finally had them handled by Brand Brothers, Atlanta, Georgia. Brand Brothers submitted an accounting to complainant showing that it netted \$6,408.69 after handling the potatoes, which amount it paid to complainant for its account.

Respondent is liable for the full purchase price of the carload of potatoes plus the freight which was paid for them by complainant in the total amount of \$22,155.63, less the \$6,408.69 paid to complainant by Brand Brothers when it handled the potatoes for complainant's account. This amounts to a total liability on the part of respondent of \$15,746.94. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. Respondent's counterclaim should be dismissed.

ORDER

Within thirty days from the date of this order respondent shall pay to complainant, as reparation, \$15,746.94, with interest thereon at the rate of 13% per annum from July 1, 1981, until paid. Respondent's counterclaim is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,918)

SUNFRESH, INC. v. GERALD D. WILLIAMS CO. PACA Docket No. 2-6091. Decided September 15, 1983.

Damages, return of pallets and boxes—Damages, breach of contract—Counterclaim, freight.

Edward M. Silverstein, Presiding Officer.

Complainant, *pro se*.

Stephen R. Winfree, Sunnyside, Washington, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against

respondent in the amount of \$4,870.40, in connection with two transactions, in interstate commerce, involving onions.

A copy of the Department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint, and filed an answer thereto denying any liability to complainant. In addition, respondent filed a counterclaim in the amount of \$527.00, in connection with the same two shipments of onions.

Since the amount claimed as damages did not exceed \$15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements. Respondent filed a verified Answering Statement, and complainant filed a verified Statement in Reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Sunfresh, Inc., is a corporation whose mailing address is P.O. Box 400, Royal City, Washington 99357.
2. Respondent, Gerald D. Williams Co., is a corporation whose mailing address is P.O. Box 485, Sunnyside, Washington 98944.
3. At all material times, both complainant and respondent were licensed under the Act.
4. On or about October 14, 1981, complainant sold respondent five truckloads of onions at an f.o.b. price of \$3.00 per hundredweight for shipment in interstate commerce, or in contemplation of interstate commerce. Respondent was to pick up the first two loads of onions during the week of October 19, 1981. The remaining three loads were to be picked up three or four weeks later after notice to complainant. Pursuant to this agreement, the first two loads of onions were picked up by respondent on October 20, and October 21, 1981. These two loads were received and accepted by respondent which paid complainant for them in full. The onions were sold and shipped directly to Stokely-Van Camp, Inc., Frozen Foods Division, Albany, Georgia 97321, by respondent. At some later date, respondent returned 80 of the 160 pallets and bins in which these onions were packed. It also attempted to provide complainant with replacements for the remaining 80 pallets but complainant rejected them.
5. Respondent advised complainant, during the contract negotiations, that, after receipt of the first two loads, the remaining three loads would not be picked up until after respondent's customer finished packing other

commodities. As respondent did not know when this would occur, it was to notify complainant when it would pick up the last three loads.

6. Rather than waiting for notice from respondent, complainant continued packing the onions in air tight triwall cardboard containers after respondent picked up the first two loads, and finished this packing on October 25, 1981. Respondent was not ready for the remaining loads of onions until about one month later. After notice to complainant, two loads of onions were picked up by respondent on November 23, and November 24, 1981. The fifth load of onions was never picked up by respondent. It was not made a subject of the complaint.

7. The November 23, and November 24, 1981, loads of onions were shipped from complainant's location to John Inglis Frozen Foods ("Inglis") at Grandview, Washington. Upon their arrival, Inglis notified respondent of the "poor condition" of the onions. In turn, respondent notified complainant.

8. Inglis ran the onions which had been delivered on November 24, 1981, through its processing plant on November 25, 1981. On December 1, 1981, it sent the following letter to respondent:

The plant ran 7-½ bins on Tuesday, 11-24-81, of load number one, delivered 11-23-81.

Raw produce used was 8,794 pounds. Pounds recovered were 3,510 for a yield of 39.9%. The plant could not stay in grade because of the brown core and internal rot in the onions.

The average yield on a normal year has been 68%. The average brown core and rot was 79.6% of all the grades taken. This does not make it at all feasible to run the onions.

9. On December 7, 1981, complainant sent respondent a letter in which, in pertinent part, it stated:

After receiving your letter of December 1, 1981, we decided to get any salvage possible on the onions you had purchased and had not yet picked up. We had 42,160 lbs. of bulk #2 onions still being held on the floor for you, of that we were able to salvage five hundred 50# bags, without equating any overage in those bags we still recovered in excess of 61%.

On approximately October 14, 1981, it was mutually agreed that Sunfresh would begin accumulating its #2 onions for you to be processed. In doing this the onions were placed temporarily in a bulk container to be used only for transporting and then returned. When two loads were accumulated you were notified and arranged for a truck to haul it to your destination. The market continued to rise with excellent demand and we continued running hard and putting up the #2 onions for you

even though many other markets were available at double to triple the money you were paying. October 25, 1981, we finished packing onions and you were notified to pickup your product. Had we known at that time, the length of time the remaining three loads of onions were going to sit on our floor we would have placed them back into storage in the proper container, or marketed them to another person for immediate shipment. You were called once and sometimes twice a week, never giving us a definite pickup time for your onions. On November 23 and November 24, you picked up a load of onions still leaving one load on the floor which we have taken our loss on, and repacked for another consumer.

We feel the situation was not handled properly as to time of purchase and time of pickup. We feel you owned the onions from the day we finished packing them. Therefore with this letter begins a formal action with PACA and an amount due Sunfresh of \$2,810.00 plus 160 (pallets and bins not yet returned) at \$19.50 = \$3,120.00 for a total of \$5,930.00 due.

10. On December 16, 1981, respondent sent complainant a letter containing the following information:

We received your letter dated December 7, 1981, and there are clearly some exceptions that we must take concerning your comments. In mid-October we did contact your firm concerning the purchase of Number Two onions for processing as we had done the previous season.

We did state that we could handle a volume of onions during the week of October 19-23 in order to obtain a supply of finished product for Stokely-Van Camp. We further stated that they would move into a pack of squash and upon completion of this in 3 or 4 weeks we would then continue to pack onions. We also indicated that we had an additional packer who would be running onions namely, John Inglis Frozen Foods.

Upon completion of the fall packs we did continue to receive onions from you as well as other suppliers and we are continuing today.

Upon receipt of the onions at John Inglis Frozen Foods they notified me of the poor condition of the onions and I immediately notified your firm. John Inglis processed 8,794 pounds of product from your deliveries. The brown core and rot was 79.6% on this lot. The recovery was 3510 pounds of product or a yield of 39.9% compared to a normal of 68%. I then requested a thorough evaluation of the remainder of the product, copies of which are attached. These tests were as follows:

<u>11-23-81 Load #1</u>	<u>Grade Test Record</u>		
	<u>Count</u>	<u>Ounces</u>	<u>Grade</u>
#1 Sample Size	47.5 lbs	760	
No. 1	13.5 lbs	216	28.4%
Rotten	9 lbs	144	19.0%
Brown Core	25 lbs	400	52.6%
#2 Sample Size	52.5 lbs	840	
No. 1	9.5 lbs	152	18.1%
Rotten	5 lbs	80	9.5%
Brown Core	38 lbs	608	72.4%
#3 Sample Size	51.5 lbs	824	
No. 1	12 lbs	192	23.3%
Rotten	6 lbs	96	11.7%
Brown Core	33.5 lbs	536	65.0%
#4 Sample Size	53 lbs	848	
No. 1	5.5 lbs	88	10.4%
Rotten	10 lbs	160	18.9%
Brown Core	37.5 lbs	600	70.7%
<u>11-24-81 Load #2</u>			
#1 Sample Size	147.5 lbs	2360	
No. 1	39 lbs	624	26.4%
Rotten	30.5 lbs	488	20.7%
Brown Core	78 lbs	1248	52.9%
#2 Sample Size	51 lbs	816	
No. 1	6.5 lbs	104	12.8%
Rotten	10 lbs	160	19.6%
Brown Core	34.5 lbs	552	67.6%
#3 Sample Size	55.5 lbs	888	
No. 1	13 lbs	208	23.4%
Rotten	4.5 lbs	72	8.1%
Brown Core	38 lbs	608	68.5%

This clearly indicates that the product was not useable and therefore no value [sic]. The product was stored in containers which did not allow circulation and by your own admittance [sic] stored on the floor and not in proper environment. Inglis has not yet filed a claim for freight, loss of product, and disposal of the product. We will forward these claims to you.

In addition, Stokely-Van Camp has informed me that the product supplied by you did not meet grade because of internal browning. This product must be re-run in order to make grade at considerable cost. Your comments relative to a claim against

us seems most inappropriate for your firm clearly delivered inferior product in both instances.

11. On January 22, 1982, Stokely-Van Camp, Inc., sent respondent a letter containing the following information:

Reference onions received from Sun Fresh [sic] Farms November 1981. These onions were mostly bad. They were predominately [sic] bolted onions with a lot of rot. We could not make fancy grade out of these and in order to upgrade we will have to repick thereby investing more dollars into the product and perhaps even with this we may not upgrade to the desired product. Our first repick operation cost us 35¢ per pound and this is prohibitive. We feel that we received what would normally go in the garbage or pig feed, whatever is done with unsaleable product.

The product came to us in corrugated totes which in many cases were made useable only by virtue of ropes which kept the sides from collapsing. They were, in all cases, in very poor condition. We threw them all away as they were in such poor condition. With such poor onions and poor conditions we do not anticipate doing any further business with Sun Fresh [sic] Farms.

12. On March 9, 1982, Inglis sent respondent a letter containing the following information:

With regard to the onions delivered to John Inglis Frozen Foods, Grandview, WA; the product was unusable for processing; or in my opinion, anything else. We sampled these two loads in several places and you have a copy of the grade slips. We rejected both loads after attempting a salvage run, requested by you, at considerable expense to us. Shortly after that, you and I reviewed the product and you were informed that JIFFCO would not cover the in-coming freight or any other related expenses to disposing of these two loads of rejected onions. We did pay you for the onions we attempted to process (8,794#s). At that time I requested that you get this product removed from the plant site.

As to the bins and pallets, they were removed mid-January. As you will recall both bins and pallets were in extremely poor shape and we did not want to have to pay to dispose of them.

Regarding any additional costs to be born by John Inglis Frozen Foods, I feel that we have no further obligation to you or your supplier on this matter.

13. A formal complaint was filed May 28, 1982, which was within nine months of when the causes of action stated herein accrued.

CONCLUSION

Complainant seeks \$4,370.40 as owed it for two loads of onions (\$2,810.40), plus the cost of 80 pallets and bins used for transporting two other loads of onions (\$1,560). Respondent disputes both claims. Its position is that the "poor" condition of the onions, and the pallets and bins, as well as its attempt to replace the latter precludes it from being obligated to complainant any further.

Complainant does not deny the poor condition of the bins and pallets. In point of fact, it implicitly admits their condition in its verified Statement in Reply.¹ However, complainant claims that their poor condition gave respondent no right to dispose of them. While complainant may be right in this regard, inasmuch as the pictures submitted as evidence, as well as the statements from Stokely-Van Camp, Inc., confirm the poor condition of the bins and pallets, we cannot conclude that they had any value, much less than \$1,560 claimed by complainant. Therefore, since respondent made a good faith effort to replace the pallets and bins, and because the pallets and bins which were disposed of apparently had no value, complaint's claim for damages in this regard is denied.

Much like its evidence on the pallets and boxes, respondent's evidence on the poor condition of the onions shipped to Inglis consisted of pictures and statements from Inglis.² And again, complainant does not deny the condition of the onions at the time of delivery in late November 1981. Complainant argues, however, that the onions, at the time of packing in late October 1981, met its contractual obligations to respondent. Its position is that it correctly packed the onions in October, and that respondent should have picked them up at that time. Respondent claims that it told complainant that it would not take the last three loads of onions for several weeks after it picked up the first two. The dispute between the parties, thus, appears to evolve around whether, as respondent claims, it notified complainant that, while it would take delivery of the first two loads of onions in October 1981, it would not take delivery of the last three until after its customers finished packing other commodities.³ We are satisfied that the evidence, including the stat-

¹There it states: "The condition of the bins and pallets gave them no right to dispose of them or replace them with others."

²Neither party raised an issue as to whether these onions moved in interstate commerce. Since that is a jurisdictional issue, we raise it *sua sponte*. However, it is clear that onions did, at least, move in contemplation of interstate commerce. *James Westrick Ray Westrick Farms*, 42 Agric. Dec. 434 (1983).

³It is noted that complainant has not claimed damages as to the fifth load of which respondent never picked up. See Findings of Fact No. 6.

ments of the parties and of the third parties who submitted affidavits, indicates that it did so. Accordingly, it appears that complainant failed to handle the onions properly while they remained in its care.

We must hold, however, since it appears that respondent took possession and control over the two loads of onions, that it accepted them. *Bilroy's Farm v. Ruby Produce*, 30 Agric. Dec. 1004 (1971). Having accepted them, respondent is obligated to the complainant for their full purchase prices less provable damages. *Corrin Prod. Sales v. Wholesale Prod. Supply*, 34 Agric. Dec. 1205 (1975). The evidence indicates that the contract prices for the two loads were \$1,396.20 and \$1,414.20, for a total of \$2,810.40, and that respondent was paid for only 8,794 pounds out of the total of 93,680 pounds by Inglis. It follows that, while it should be obligated to complainant in the amount of \$263.82, or the contract price of \$3.00 per cwt. times 87.94 cwt, since the remaining onions were of no value, respondent should not be obligated to complainant for them.

Respondent has counterclaimed in the amount of \$527.00, which is the cost of freight for the two loads of onions. It is entitled to such damages as a result of complainant's breach of contract. *John C. Taylor Co. v. Wm. J. Hanlon Co.*, 30 Agric. Dec. 398 (1971). Since respondent is obligated to complainant in the amount of \$263.82, complainant's obligation to respondent is in the amount of \$263.18, i.e., \$527 less \$263.82. We find that complainant's failure to pay respondent this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within thirty days from the date of this order, complainant shall pay respondent \$263.18 plus interest in the amount of 13% per annum from December 1, 1981, until paid.

Copies of this order shall be served on the parties.

(No. 22,919)

CAL-SHRED, INC. a/t/a STRAWBERRY CITY SALES v. GEORGE DE PAOLI DISTRIBUTING COMPANY. PACA Docket No. 2-6107. Decided September 15, 1983.

F.O.B. Sale—Acceptance—Suitable shipping condition—Evidence of dumping—Measurement of damages.

An inspection of the shipment of strawberries reveals they were not in suitable shipping condition upon arrival at destination. However, respondent failed to provide a dump certificate and a reliable accounting to measure any damages. Furthermore respondent submitted a document as evidence which showed that 48 cartons of strawberries were

sold two days before the inspection. Therefore respondent failed to meet its burden of proof as to suitable shipping condition. Reparation was awarded to complainant.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complaint.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$731.00 in connection with the sale of strawberries in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto, denying liability with respect to the transaction. Subsequently, an order for payment of undisputed amount was issued for \$84.00, leaving for further determination the remaining \$647.00.

The claim for damages in the formal complaint does not exceed \$15,000.00. Accordingly, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of verified statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Cal-Shred, Inc. a/t/a Strawberry City Sales, is a corporation with an address at P.O. Box 1175, Watsonville, California.

2. Respondent, George De Paoli Distributing Company, is a corporation with an address at 45 Plaza Circle, Salinas, California. At the time of the transaction in issue in this proceeding respondent was licensed under the Act.

3. On October 27, 1981, complainant sold to respondent 84 cartons of strawberries at \$8.00 per carton, plus \$42.00 for cooling and \$17.00 for Tectrol, for a total contract price of \$731.00, F.O.B. The strawberries were shipped on that date from California to Joplin, Missouri, where they were received by respondent's customer Harry's Food Service on October 30, 1981.

4. On November 2, 1981 an undetermined number of cartons of strawberries were inspected at Harry's Food Service place of business. The inspection showed in pertinent part as follows:

<u>Condition of Load:</u>	Stacked at above location in cool room.
<u>Condition:</u>	Berries mostly ripe and firm. From 5 to 13% average 9% damaged by bruising. From 10 to 18% average 14%, mostly Gray Mold Rot some Rhizopus Rot above half of which is accompanied by a light growth of mold.
<u>Remarks:</u>	Applicant states above described lot was part of a trailer shipment from California.

5. A formal complaint was filed in this proceeding on June 15, 1982 which was within nine months of the time the cause of action involved herein arose.

CONCLUSIONS

Complainant claims that it shipped from California to Missouri 84 cartons of strawberries which had been purchased by respondent, George De Paoli Distributing Company. Respondent maintains that when the strawberries arrived in Joplin, Missouri, they were in such unsatisfactory condition as to indicate that complainant had violated the warranty of suitable condition when they were shipped. Respondent further avers that because the strawberries did not arrive until Friday afternoon, and could not be inspected until Monday November 2, 1981, they were rejected by its customer Harry's Food Service.

The unloading of the truck by Harry's Food Service on or about October 30, 1981 is an act of acceptance of the goods. *Theron Hooker Company v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (1971). Therefore, the question which remains is whether complainant breached its warranty of suitable shipping condition due to the condition of the strawberries when they were inspected on November 2, 1981, and if so the damages which were sustained by respondent. Respondent has admitted that it owed \$84.00, or \$1.00 per carton, of the total contract price of \$731.00, and an order for the underdisputed amount has been issued against and paid by respondent.

Accepting as true respondent's statements that it could not secure an inspection prior to November 2, 1981, three days after the strawberries arrived, we find on this record that the strawberries were not in suitable shipping condition when transported from California to Missouri. In *Empire Distributing Company v. Wholesale Produce Supply, Inc.*, 32 Agric. Dec. 1301 (1973), No. 2 strawberries with condition defects averaging 11 percent after three days of transportation were found not to be in suitable shipping condition. Here we have 23 percent condition

defects after four days of travel and two days in storage for U.S. No. 1 strawberries. We find this shows too much deterioration for U.S. No. 1 strawberries.

Despite the fact that the strawberries were not in suitable shipping condition complainant must prevail on the basis of this record. Respondent alleged that 36 cartons of strawberries were dumped by its receiver, but there was no dump certification provided. It is a requirement under the regulations that when goods are dumped a dump certificate be provided which reflects such action. 7 CFR 46.23. Failure to do so provides lack of evidence of dumping, and leads to necessary conclusion that the strawberries were marketed *La Mantia-Cullum Collier & Co., Inc. v. Bet P. Castille*, 34 Agric. Dec. 769 (1975). Equally importantly, respondent failed to provide a reliable accounting as regards the prices fetched for the strawberries which it does not claim were dumped. To establish damages it is necessary that respondent provide an accounting since damages are generally measured when there is a breach of warranty of suitable shipping condition as the difference between the market value of goods meeting the contract requirements and the value of those actually delivered. *International Produce Distributors Inc. v. A&L Produce Co., Inc.* 31 Agric. Dec. 356, 363 (1972).

Furthermore, there is a fatal defect in respondent's defense. Respondent submitted as evidence a document which purported to be an accounting which showed that the 48 cartons of strawberries which were not dumped were sold on October 31, 1981 for \$3.50 per carton. The date of sale shown thereon was two days before the inspection on which respondent relies to establish that the strawberries were not in suitable shipping condition. Because of the sales and the lack of a dump certificate we cannot find that respondent has met its burden of proof that the strawberries were not in suitable shipping condition. Respondent is, therefore, liable to complainant for the full purchase price of the strawberries, or \$731.00, less the \$84.00 which we have already awarded an order dated October 27, 1982, or a net amount of \$647.00. Respondent's failure to pay complainant such an amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay complainant as reparation, \$647.00, with interest thereon at the rate of percent per annum from December 1, 1981, until paid.

Copies of this order shall be served upon the parties.

(No. 22,920)

FRITO-LAY, INC. *v.* CLYDE JOHNSON. PACA Docket No. 2-5863. Decided September 23, 1983.

Excuse for non-performance—Conditions in contract—Conduct of parties gives meaning to contract.

Where there is a provision in a contract holding respondent harmless if it cannot meet terms of contract, and the other party shows its understanding that provision is applicable when there is a crop failure, respondent is not liable.

George S. Whitten, Presiding Officer.

David P. Phillips, Dallas, Texas, for complainant.

William A. Brelje, Grand Rapids, Michigan, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930 as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$221,501.78, in connection with the alleged failure to deliver chipping potatoes in interstate commerce.

A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was also served upon complainant. Respondent filed an answer to the complaint in which it denied owing any amount to complainant.

Although the amount involved in the complaint exceeds \$15,000.00, the parties waived oral hearing and the shortened method of procedure provided in the Rules of Practice (7 CFR 47.20) is therefore applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of depositions or sworn statements. Complainant filed as an opening statement the deposition of respondent's president. Respondent filed an answering statement. Complainant submitted a statement in reply which was not received in evidence because filed late. Complainant also submitted a brief which was not accepted because filed late. Respondent did not file a brief.

FINDINGS OF FACT

1. Complainant, Frito-Lay, Inc., is a corporation whose address is P.O. Box 35084, Dallas, Texas.

2. Respondent, Clyde Johnson, Inc., is a corporation whose address is Box 132, Martin, Michigan. At the time of the transaction involved herein respondent was licensed under the Act.

3. On March 21, 1980, complainant and respondent entered into a contract for the sale of chipping potatoes by respondent to complainant. The contract was on a form bearing the Frito-Lay, Inc., letterhead and entitled "Confirmation of purchase." Such contract provided in relevant part as follows:

#3695

SELLER: Clyde Johnson, Inc.

SHIPPING POINT: Michigan

PURCHASE MADE: 64,000 Cwt. Chipping Potatoes

CONFIRMATION ISSUED: March 21, 1980

SHIP TO FRITO-LAY, INC.. Any receiving point Frito-Lay so designates.

PURCHASED SO AS TO ARRIVED: In a chipping condition and on buyer's orders & instructions.

DELIVERY DATE		QUANTITY	UNIT	GRADE	SIZE	COMMODITY	UNIT PRICE
1980-1981		25,000	Cwt.	US #1	A	Chipping potatoes	\$3.85
Sept.-Oct		39,000	Cwt	US #1	A	Chipping potatoes	
Storage							
November 1980							\$4.45 Nov
December 1980							\$4.65 Dec.
January 1981							\$4.85 Jan
February 1981							\$5.05 Feb.
March 1981							\$5.45 Mar.
April 1981							\$5.85 Apr.

September & October deliveries to be treated with MH 30. Seller will not be held responsible for any default of this contract due to circumstances beyond his reasonable control. All potatoes under this contract guaranteed to chip to Frito-Lay's satisfaction upon arrival. Frito-Lay reserves the option of not accepting delivery of potatoes which does not meet the above shipping schedule.

PURCHASED: F.O.B. SHIPPING POINT: Michigan

TRUCK: Yes; ABOVE GRADES AND CONDITIONS GUARANTEED
DESTINATION: Yes

PURCHASER MAY AT ANY TIME RETURN TO SELLER AT
SELLER'S EXPENSE ANY PORTION OF GOODS LISTED HEREIN,
WHEN IN THE OPINION OF PURCHASER IN ITS SOLE

DISCRETION SUCH GOODS DO NOT CHIP TO ITS SATISFACTION AND PURCHASER, AT ITS ELECTION, SHALL BE ENTITLED TO RECEIVE FROM SELLER FOR SUCH RETURNED GOODS FULL CREDIT THEREFOR OR REPLACEMENT THEREOF WITH GOODS THAT DO CHIP TO PURCHASER'S SATISFACTION. SELLER GUARANTEES PROPER LOADING ACCORDING TO CARRIERS' TARIFF SPECIFICATIONS AND GUARANTEES LOWEST THROUGH RATE. . . .

4. It was respondent's practice to enter into verbal agreements with growers in the state of Michigan to secure supplies of chipping potatoes and subsequently, in the summer, after return of its president, James Boss, from other business in Florida, to reduce the verbal agreements to writing. During the 1980 potato growing season Michigan potato growers experienced a severe crop failure caused by excessive rainfall. The excessive rains occurred throughout the growing season, but were worst in the late spring-early summer, and at times left significant amounts of water standing in growing potato fields. In addition to causing extensive reduction in the total potato crop harvested, the rains also caused blight and made storage of potatoes for delivery of potatoes from November, 1980 through April, 1981, very difficult and in some cases impossible. Many of the potatoes had to be harvested wet to keep them from rotting in the ground, and because they were wet they would not store well and were subsequently lost through breakdown during storage. The chipping quality of potatoes which were able to be stored was often adversely affected.

5. During September of 1980, Norman C. Berger, a member of the Board of Directors of respondent corporation, had discussions with Mr. Sylvester Elder, Mid-Central area potato buyer for complainant corporation, concerning the severe crop failure in Michigan in 1980. Based upon what was agreed to be an unforeseen and uncontrollable severe crop failure, Mr. Elder "balanced," or in other words "cancelled out," the September-October portion of the contract between complainant and respondent. No deliveries were made by respondent to complainant under the September-October portion of this contract. However, two loads of potatoes were delivered by respondent to complainant in October and November, but at delivered prices in excess of those specified in the contract. The November load of potatoes was rejected by complainant.

6. At the same time that Mr. Berger and Mr. Elder agreed to the cancellation of the September-October portion of the potato contract they also discussed cancelling the winter portion of the contract for the same reason but agreed not to do so at that time because respondent was willing to try to supply potatoes to Frito-Lay. At that time Mr. Berger and Mr. Elder agreed that if respondent could not supply the

potatoes under the winter or storage portion of the contract that this portion of the contract would also be cancelled.

7. On September 30, 1980, James Boss, president of respondent corporation sent the following letter to Sylvester Elder:

Mr. Elder,

Per your phone conversation with Mr. Norm Berger, please balance our summer contract #3695.

8. On February 24, 1981, Bill Robards, Eastern area manager for Frito-Lay, sent a telegram to James Boss of Clyde Johnson, Inc. which stated in relevant part as follows:

THIS WIRE IS TO CONFIRM OUR ORDER FOR POTATOES PLACED WITH YOUR COMPANY BY SYLVESTER ELDER, ON FRIDAY, FEBRUARY 20, 1981.

DELIVER TO FRITO-LAY, INC., ALLEN PARK, MICHIGAN:
2-23-81 PO 2060

2-24-81 PO 2170

2-25-81 PO 2186

2-26-81 PO 2243

2-27-81 PO 2323

DELIVER TO FRITO-LAY, INC., WOOSTER, OHIO:

2-28-81 PO 2921

2-24-81 PO 2925

2-25-81 PO 2930

2-26-81 PO 2935

2-27-81 PO 2940

Respondent did not make any deliveries to complainant in response to complainant's order.

9. On March 20, 1981, Bill Robards again sent a telegram to complainant which stated in relevant part as follows:

OUR RECORDS INDICATE AN OUTSTANDING BALANCE OF 40,000 CWT. OF CHIPPING POTATOES DUE FRITO-LAY, INC., FROM CLYDE JOHNSON, INC., ON CONTRACT NUMBER 3695. WE EXPECT DELIVERY OF THIS CONTRACT. PLEASE SHIP THE FOLLOWING SCHEDULE TO ARRIVE ON THE DATES LISTED:

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DATE	PO #	DESTINATION	PO #	DESTINATION
3/24/81	2060	Allen Park, Mi.	2921	WOOSTER, OHIO
3/25/81	2170	Allen Park, Mi	2925	WOOSTER, OHIO
3/26/81	2186	Allen Park, Mi.	2930	WOOSTER, OHIO
3/27/81	2243	Allen Park, Mi.	2935	WOOSTER, OHIO

Upon your failure to ship this schedule, we will buy potatoes on the open market against your account.

10. On March 25, 1981, James Boss sent a telegram to Frito-Lay which stated in relevant part as follows:

ATTN BILL ROBARDS EASTERN AREA POTATO PURCHASING
MANAGER YOU ARE WELL AWARE OF THE DRASIC
PRODUCTION LOSSES OF MICHIGAN POTATOES. DUE TO
CIRCUMSTANCES BEYOND OUR REASONABLE CONTROL, WE
ARE UNABLE TO COMPLETE DELIVERY OF CONTRACT NUMBER
3695. WE WILL NOT AUTHORIZE PURCHASE OF POTATOES FOR
OUR ACCOUNT.

11. An informal complaint was filed on April 15, 1981, which was within nine months after the cause of action alleged herein accrued.

CONCLUSIONS

Complainant brings this action to recover the difference between its cost of cover and the contract prices for the 39,000 hundredweight of storage potatoes which were scheduled for shipment sometime during November of 1980 through April of 1981. Complainant stated in its formal complaint its belief that "respondent was in a position to fulfill its delivery commitments under the Agreement, and there were no circumstances beyond respondent's reasonable control which made respondent unable to complete delivery."

Respondent points to the sentence in the contract stating: "Seller will not be held responsible for any default of this contract due to circumstances beyond his reasonable control." Respondent claims that this clause of the contract excused performance due to the widespread crop failure in Michigan referred to in the findings of fact.

The provision of the Uniform Commercial Code (section 2-615) excusing performance which has been made "impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . ." has been dealt with in previous decisions by this Department. See *Bliss Produce Co. v. A. E. Albert & Sons*, 35 A.D. 742 (1976). Under this and other decisions the subject

contract would be judged to fall outside the impracticability excuse of the Code since it did not call for potatoes from specified farm acreage. However, in this case we are confronted with an additional provision inserted by the parties into their contract, namely: "seller will not be held responsible for any default of this contract due to circumstances beyond his reasonable control." The phrase "circumstances beyond his reasonable control" is ambiguous, and we would normally interpret such a phrase in the light of the traditional law of impracticability reflected in the Uniform Commercial Code. Under such an interpretation the language inserted by the parties in their contract would certainly be superfluous and unnecessary, but in no wise remarkable on that account, since parties often include in contracts statements which only affirm that which would in any case be dictated by the law. There is, however, a principle of interpretation in regard to ambiguous contractual terms which, when applicable, can be of great consequence. We deem the principle to be applicable in this case. Simpson (Ch. 7, §67, Handbook of the Law of Contracts, p. 254, 1954 Ed.) states the principle as follows:

The interpretation which the parties themselves have placed on their contract, as shown by their conduct subsequent to its formation, will have great weight in determining the meaning to be given to doubtful terms and has been said to be "the best evidence of their intention." (cases cited)

Respondent submitted as a part of its answering statement the sworn statement of Norman C. Berger, a member of its board of directors, the substance of which has been adopted by us in findings of fact 5 and 6. This statement was totally unrebuted by complainant, and we accordingly accept the facts related therein as established. According to Mr. Berger:

Based upon [the] unforeseen and uncontrollable severe crop failure Mr. Sylvester Elder "balanced" or in other words "cancelled out" the September-October portion of our contract, because he realized at the time that our inability to deliver was due to circumstances beyond our reasonable control.

In accord with this statement we see no alternative but to find that complainant has acquiesced in deeming the Michigan crop failure as a circumstance beyond the reasonable control of respondent. Mr. Berger further stated:

I left the discussions with Mr. Elder with the understanding that if Clyde Johnson could not deliver the potatoes under the winter or storage portion of the contract that it too would be balanced because the crop failure was clearly due to circumstances beyond our reasonable control.

Even if the above quoted statement by Mr. Berger is not construed as

evidencing an agreement to excuse further performance under the contract, it does further establish what the parties meant by "circumstances beyond his reasonable control." We conclude that respondent was excused under this clause of the contract from further deliveries due to the crop failure in Michigan. Accordingly, the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,921)

MUTUAL VEGETABLE SALES *v.* HITE'S POINT. PACA Docket No. 2-5900. Decided September 23, 1983.

Rejection, rightful—Transportation conditions, burden of proof—Warranty of suitable shipping condition—Chemical effect by mixing lettuce and cantaloupe—Complaint dismissed.

Where respondent showed that the way complainant packed the lettuce, causing a loss of air space on the side walls of the trailer, it proved complainant violated the warranty of suitable shipping condition, and that lettuce did not make good delivery. Reparations awarded to respondent.

George S. Whitten, Presiding Officer.

Matthew M. McInerney, Newport Beach, California, for complainant.

LeRoy Gudgeon, Northfield, Illinois, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparations in the amount of \$4,488.34 in connection with the sale of 800 cartons of lettuce to respondent in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant and requesting an oral hearing. Respondent also filed a counterclaim arising in part out of the same transaction and in part based upon the alleged unauthorized resale by complainant of 126 one-half

cartons of cantaloupes which were contained on the same truck as the lettuce, and had been purchased by respondent from Hal Abbatte Company. Complainant filed a reply to the counterclaim denying any liability thereunder.

An oral hearing was held on July 22, 1982, in Cleveland, Ohio. Two witnesses testified at the hearing on behalf of respondent. Complainant did not appear at the hearing. Both parties filed briefs and claims for fees and expenses.

FINDINGS OF FACT

1. Complainant, Mutual Vegetable Sales, is a corporation whose address is P.O. Box 1996, Salinas, California. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent is an individual, George T. Hite, doing business as Hite's Point, whose address is Route 2, U.S. 250 South, Norwalk, Ohio. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about September 17, 1980, complainant sold to respondent 800 cartons of ungraded lettuce, size 24's, at \$4.00 per carton, plus \$.60 cooling and \$22.50 for a Ryan temperature recorder, or a total of \$3,702.50, f.o.b. The invoice sent by complainant contained the notation: "ALL SALES F.O.B. NO GRADE CONTRACT GOOD DELIVERY STANDARDS APPLY EXCLUDING BRUISING AND/OR DISCOLORATION FOLLOWING BRUISING."

4. A Truck containing 126 one-half cartons of cantaloupes loaded in the nose of the truck, and purchased by respondent from Hal Abbatte Company, arrived at Grower's Vacuum Cool Company in Salinas, California at 4:30 p.m. on September 17, 1980, to pick up the lettuce. The lettuce was loaded onto the truck, and the truck left the place of business of Grower's Vacuum Cool Company at 10:30 p.m. on September 17. The lettuce arrived at respondent's place of business in Norwalk, Ohio on September 22, 1980.

5. Subsequent to arrival the lettuce was federally inspected at respondent's place of business, while still on the truck, at 1:30 p.m. on September 22, 1980, with the following results in relevant part:

Condition of Equipment: Mechanical refrigeration unit in operation.

Products Inspected: Iceberg LETTUCE in cartons printed "Merri Farms, 2 doz. heads, Merrill Farms, Salinas, California." Applicant states 800 cartons.

Condition of Load: Loaded in rear $\frac{1}{4}$ length of trailer, crosswise a on-sides, 6 and 7 rows, 5 to 7 layers.

<u>Condition of Pack:</u>	Tight in layers.
<u>Temperature of Product:</u>	Rear doors: Top layer 45°F., floor layer 46°F. At side door: Top layer 70°F., floor layer 74°F.
<u>Condition:</u>	Heads or portions of heads not affected by condition defects are fresh and crisp. <i>Wrapper leaves</i> : No decay. <i>Head leaves</i> : Damage by Russet Spotting ranges from 7 to 12 heads per carton, average 40%. Decay in most cartons from 1 to 15 heads, in some none, average 25%. Bacterial Soft Rot, mostly early, some in advanced stages, affecting 3 outer leaves to entire head.
<u>Remarks:</u>	Inspection and certificate restricted to product and lading in 4 stacks nearest rear doors, upper 2 layers of next 6 stacks and upper 3 layers of 2 stacks inside door.

6. The temperature tape from the Ryan recorder included with the lettuce shows a date of 9/17/80 and a time of 11:10. The trace on the tape appears to begin at about the fourth hour at approximately 73° and continues steady at about 73-74° until the ninth hour where there is a vertical line indicating that the unit was jarred and an immediate almost vertical drop to approximately 50° at the tenth hour. The trace continues to drop more gradually at 40° at about the 13th hour, at which point it rises sharply to approximately 54° at about the 15th hour and immediately begins a decline to about 48° at the 18th hour, from whence there is a steady and gradual decline to 40° at about the 46th hour. The tape continues at 40° until approximately the 56th hour where it drops below the 40° line to about 39° until approximately the 66th hour. The trace continues at 40° until approximately 108th hour where it can no longer be seen. At approximately the 119th hour the trace begins again at 62° with an immediate vertical drop to about 42° and a further more gradual decline to about 37° at the 120th hour. There is a further gradual decline to about 34° at the 126th hour. Immediately after the 126th hour there is an almost vertical rise to approximately 64° within one-half hour's time and a subsequent and immediate fall to about 35° at the 129th hour where the trace ends.

A Ryan recorder was also included with the cantaloupes. The tape from this recorder is dated 9-17-80 and the time is stated to be 1:40. The trace on this tape begins at approximately the 6th hour with a vertical drop from 80° to approximately 42° at the 7th hour. At the 7th hour there is almost a vertical rise to approximately 65° with an immediate drop back to approximately 41° at approximately the 16th hour. The tape continues between 41 and 43° until the 36th hour and then

gradually falls to 40° at the 48th hour where it continues (with the exception of one slight rise to about 42° at the 76th hour) until the 96th hour. There is then a gradual rise to about 41° at the 108th hour and a further gradual rise to about 42° at the 126th hour where the trace ends.

7. Shortly after the federal inspection at destination respondent communicated to complainant through the broker its rejection of the lettuce. Respondent could have unloaded the cantaloupes from the truck at this time by first unloading approximately 150 cartons of lettuce, but respondent did not do so due to its fear that such action might worsen the condition of the lettuce.

8. The truck containing the lettuce and the cantaloupes was sent by complainant to Walter Gailey & Sons, Inc., in Cleveland, Ohio to be sold on a consignment basis. Walter Gailey & Sons, Inc., issued an accounting showing gross proceeds of the resale of the lettuce of \$2,103.66, and gross proceeds of the resale of the cantaloupes in the amount of \$630.00. Brokerage in the amount of \$120.00, an inspection fee in the amount of \$27.00 and a handling charge in the amount of \$42.50 were deducted from the gross proceeds of the lettuce, and complainant received net proceeds in the amount of \$1,914.16. Walter Gailey & Sons, Inc., made no deduction for freight in accounting to complainant since complainant had already paid freight in the total amount of \$2,700.00. However, on instruction from complainant Walter Gailey & Sons, Inc. deducted freight in the amount of \$367.92 from the \$630.00 gross proceeds of the resale of the cantaloupes, and paid the resulting net amount of \$262.08 to respondent.

9. After arrival at the place of business of Walter Gailey & Sons, Inc., in Cleveland, Ohio, the lettuce was subjected to an unrestricted inspection during the process of unloading. This federal inspection showed in relevant parts as follows:

DATE: September 28, 1980

HOUR: 10:20 AM

...

WHERE INSPECTED: Applicant's dock

Condition of Equipment: Mechanical refrigeration unit in operation.

Products Inspected: Iceberg LETTUCE in cartons printed "Merrill Farms, 2 doz. heads, Merrill Farms, Salinas, California." Applicant states 800 cartons.

Condition of Load: Loaded in rear $\frac{3}{4}$ length of trailer, crosswise on-sides, 4 and 5 rows, 3 to 7 layers.

Cite as 42 A.D. 1576

<u>Condition of Pack.</u>	Tight in layers.
<u>Temperature of Product:</u>	Rear doors: Top layer 45° F., floor layer 47° F.
<u>Condition:</u>	Heads or portions of heads not affected by condition defects are fresh and crisp. <i>Wilted Lettuce</i> : No decay. <i>Head leaves</i> : Damage by <i>Blusset Sp. A</i> ting in most cartons from 12 to 16 heads, and <i>some</i> none, average 47%. Decay in most cartons from 3 to 7 heads per carton, and many 11 to 21 heads, average 88%, <i>Bacterial Soft Rot</i> , mostly early, many advanced stages, affecting 3 outer leaves to entire head and occurring throughout pack and load.
<u>Remarks:</u>	Inspected during process of unloading.

10. 85 cartons of the cantaloupes were subjected to federal inspection at the place of business of Walter Gailey & Sons, Inc. on September 24, 1980, at 1:42 p.m., while stacked in the receiver's warehouse. Such inspection showed the temperature of the cantaloupes to be 53° F. to 55° F., and also showed the condition to have been as follows:

Generally yellow ground color. Damage by bruising ranges from 1 to 3 melons per carton, average 11%. Decay ranges from 4 to 10 melons per carton, average 43% *Cladosporium Rot* generally in early stages generally affecting stems scars. Remainder ripe and firm.

11. The formal complaint was filed on June 2, 1981, which was within 9 months after the cause of action alleged herein accrued.

CONCLUSION

Complainant brings this action to recover damages for what it alleges to be a wrongful rejection of the lettuce on the part of respondent. The record indicates that respondent made a timely rejection, and communicated such rejection to complainant in a timely manner. In addition, complainant does not dispute the timeliness of the rejection or the communication of the rejection. Complainant instead contends that the rejection was substantively wrongful.

Of course, there is no question but that the lettuce involved arrived with condition defects well in excess of what is allowed under the good delivery standards. See 7 CFR 46.44. However, for such good delivery standards to be applicable under the f.o.b. terms of the contract, transportation services and conditions must have been normal. Complainant contends that the temperatures shown by the federal inspection of the lettuce at destination demonstrate that transportation services and conditions were in fact abnormal. The burden of proving that transportation

was abnormal rests upon complainant. See *Tenneco West, Inc. v. Gilbert Distributing, Inc.*, 38 A.D. 488 (1979). Whether complainant has met that burden presents us with an admittedly close question. The Ryan temperature tape covering the lettuce was apparently placed on board the truck at about 11 p.m. on September 17, 1980, which was approximately the time stated on the bill of lading for the departure of the truck. Since the tape was removed from the truck prior to the federal inspection of September 22, at 1:30 p.m., the maximum time which the tape should have run would be approximately 110 hours. The trace on the tape, although faint, appears to end at approximately the 110th hour. Accordingly, we conclude that the subsequent trace, referred to in the findings of fact, beginning at approximately the 119th hour and extending to approximately the 129th hour is irrelevant to this case. Throughout most of the trip by truck the trace on the tape shows an average of 40 to 41° fahrenheit. However, the report of investigation contains a letter from Ryan Instruments, Inc. which states that the Ryan temperature recorder was calibrated subsequent to its use on the subject load and was found to be reading 2.5° low at 35°F. Accordingly, it seems that we should add approximately 2.5° to the 40 to 41° average temperature shown by this particular Ryan tape.

The load contained an additional Ryan temperature recorder for the cantaloupes. The trace on this recorder also shows an average of 40 to 41°F throughout the vast majority of the trip. This instrument was also calibrated subsequent to its use on the subject truck and the report of investigation contains a letter from Ryan Instruments, Inc. stating that this instrument was found to be accurate. Accordingly it would seem that depending on the location within the truck the air temperatures registered by the two Ryan recorders ranged between 40° and 43½° throughout most of the time that the lettuce was in transit.

The complainant urges that the temperatures recorded at the side door of the trailer by the federal inspector at 1:30 p.m. on September 22, clearly indicate that the lettuce was carried at abnormal temperatures. The federal inspection shows temperatures at the side door as being 70° for the top layer and 74° for the floor layer. However, it is necessary that we explain these temperatures in the light of the temperatures shown at the rear door (45 to 46°F) and the temperatures shown by the Ryan tapes. There are two explanations that seem most likely to us for the 70° range of temperatures at the side door and neither of these explanations points towards responsibility on the part of respondent. First of all George Hite personally viewed the load of lettuce after its arrival and testified as follows at the oral hearing:

Q. Are there air passages in the body of the load?

A. No, sir.

Q. Were they tied together?

A. Very tight.

Q. There was no air passage at all in the body of load itself?

A. No, sir.

Q. Were you speaking of the canteloupes?

A. I am speaking of the lettuce.

Q. How were the canteloupes loaded, do you recall?

A. I can't really say, because they were positioned in front of the lettuce, and when I tried to gain access to the canteloupes, the lettuce was stacked higher than the opening of the side door, and since they were tied and stacked, it was quite a problem to just get at the second recorder.

Q. How did you get at that second recorder?

A. Well, one of my employees, we used the step ladder, and we took a box or two out of the way so we could shimmy up over the top of the lettuce and we just straightened out a coat hanger and used the end of the coat hanger to secure the second recorder to present to Ed Cimino to pass on Mutual Vegetables Sates.

Q. How much space was there between the top of the lettuce and the overhead of the truck itself, would you say?

A. I would estimate nor more than 18 inches.

Q. Just physically?

A. Right, and we had the canvas sleeve carry the air to the back of the trailer, compressed rather tightly while we were scooting after the second recorder.

Q. With the lettuce packed at the side door, was it very close to the side door, or how much air space was on the side between the wall of the truck and the edge of the lettuce boxes?

A. There was no air space.

Q. Then, at the rear of the truck, about how much space was there between the rear doors and the end boxes of the lettuce?

A. There was a full load, but I can't answer that accurately.

Q. What are full loads of lettuce on the back of the truck?

A. I can't tell you how compressed it was to the back doors.

This testimony by George Hite was uncontradicted by complainant. We conclude that the way in which complainant packed the lettuce so as to cause a lack of air space on the side walls of the trailer contributed to the high temperatures registered at the side doors. In addition it is well known that the decay process in lettuce will also generate high temperatures. Undoubtedly these two factors working together account for the 70 to 74° temperatures recorded at the side doors. Accordingly, we are unable to find that complainant has met its burden of proving transit

conditions to have been abnormal, and we find that respondent's rejection was rightful.¹

It should be noted that in a long line of cases we have held that where the condition of produce on arrival at contract destination is such as to clearly indicate that it would have been abnormally deteriorated at such time and place even though it was handled under abnormal transportation service and conditions, then the warranty should still be applicable. See *Sanbon Packing Co. v. Spada Distributing Co., Inc.*, 28 A.D. 230 (1969). See also, *Inter Harvest, Inc. v. Vegetable Market of Cleveland, Inc.*, 34 A.D. 697 (1975); *Jack T. Baillie Co. v. S. & K. Farms*, 32 A.D. 1874 (1973); *Stewart Packing Co., Inc. v. Raymond Heller Co.*, 21 A.D. 960 (1962); and *Anonymous*, 12 A.D. 694 (1953). In this case, considering the amount of Bacterial Soft Rot alone,² we feel that it is clear that this lettuce would not have made good delivery even had we judged the overall temperatures to have been abnormal.

Respondent counterclaimed for damages flowing from complainant's failure to ship conforming lettuce. The Uniform Commercial Code, Section 2-711, states in relevant part that:

(1) Where the . . . buyer rightfully rejects . . . then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(b) recover damages for non-delivery as provided in this Article (Section 2-713).

Section 2-713 of the Uniform Commercial Code states in relevant part that:

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference

¹ This conclusion is consistent with our subsequent conclusion that respondent was responsible for the loading of the cantaloupes insofar as complainant is concerned since complainant had no interest in the cantaloupes.

² The loading of lettuce on a truck containing cantaloupes is not a recommended practice due to the fact that cantaloupes emit ethylene gas which contributes to Russet Spotting in lettuce. See *Compatibility of Fruits and Vegetables During Transport in Mixed Loads*, Marketing Research Report No. 1070, Agricultural Research Service (May 1977). It is likely that at least some of the average 40% Russet Spotting present in the subject lettuce is attributable to respondent's combining the lettuce with the cantaloupes on one truck. Accordingly, we have not considered the Russet Spotting in determining whether there was a breach of warranty by complainant.

between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

The contract price of the lettuce was \$3,702.50. The Fresh Fruit and Vegetable Market News Reports for Cleveland, Ohio, published by the U.S. Department of Agriculture, Agricultural Marketing Service, show the following quotations for Iceberg lettuce for Tuesday, September 23, 1980:

LETTUCE (ICEBERG): HIGHER. Cartons 24s 9.00-10.00
mostly 9.50-10.00 some 8.75 fair quality 8.00-8.25 fair condition
5.00 . . .

Using the lower figure of the "mostly" quotations or \$9.50, the 800 cartons of lettuce would have had a total value of \$7,600.00 had they been as warranted. The difference between this figure and the contract price of the lettuce is \$3,897.50. There should be deducted from this amount the expense of freight, which under the f.o.b. terms of sale the respondent would ordinarily have paid, but which was saved in consequence of the seller's breach. The total freight on the load was \$2,700.00. Complainant wrote to Walter Gailey & Sons, Inc. on December 3, 1980, and requested that they deduct \$367.92 in freight applicable to the 126 cartons of cantaloupes from the gross proceeds of the sale of the cantaloupes when they remitted net proceeds to respondent. Accordingly, we conclude that the freight applicable to the lettuce was \$2,332.08. This amount deducted from the \$3,897.50 difference between market price and contract price leaves \$1,565.42 as the damages sustained by respondent resulting from complainant's failure to deliver conforming lettuce. Complainant's failure to pay respondent this amount is a violation of section 2 of the Act for which reparation should be awarded to respondent with interest.

Respondent also claims as a part of its counterclaim damages in connection with the cantaloupes. However, respondent was responsible for loading the cantaloupes in the nose of the truck, and for the rejection of the lettuce. In addition respondent elected not to remove the cantaloupes from the truck when it had the opportunity to do so, and the taking of the cantaloupes by complainant following the rightful rejection by respondent was, therefore, inadvertant as far as complainant was concerned. In addition it is possible that there may have been a breach of

contract in regard to the cantaloupes on the part of the shipper, or a deterioration in the condition of the cantaloupes caused by abnormal transportation attributable to the trucker. In any event these matters were no litigated in this proceeding.

Respondent spent considerable time at the hearing investigating the accuracy of the accounting rendered by Walter Gailey & Sons, Inc. If the accounting in regard to the cantaloupes was faulty, this is a matter between respondent and Walter Gailey, and not between respondent and complainant. In addition, we note that any inaccuracy in the accounting relative to the lettuce is a matter between complainant and Walter Gailey & Inc., and, due to the outcome of this case and the way in which damages are computed, should be of no concern to respondent.

Respondent is the prevailing party, and as such is entitled to fees and expenses incurred in connection with the oral hearing. (See 7 U.S.C. 499g(a) and 7 CFR Section 47.19(d)) Respondent submitted a claim for fees and expenses in the total amount of \$1,379.77. We judge this amount to be reasonable and to have been incurred in connection with the oral hearing. Accordingly additional reparation in such amount should be awarded to respondent.

ORDER

The complaint is dismissed.

Within 30 days from the date of this order, complainant shall pay to respondent, as reparation, \$1,565.42, with interest thereon at the rate of 13% per annum from October 1, 1980, until paid.

Within 30 days of the date of this order, complainant shall pay to respondent, as additional reparation for fees and expenses, \$1,379.77, with interest thereon at the rate of 13% per annum, from the date of this order until paid.

Copies of this order shall be served upon the parties.

(No. 22,922)

ROCKY PRODUCE, INC. v. ERNEST KATSIAS d/b/a ERNIE'S WHOLESALE PRODUCE CO. PACA Docket No. 2-6039. Decided October 3, 1983.

Method of attributing payment.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

Wilson M. Jackson, Warren, Michigan, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount \$9,397.11 in connection with 18 transactions in interstate commerce which occurred between July 23, 1981 and August 26, 1981, involving various types of fruits and vegetables.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto, denying liability to the complainant. Since the amount claimed as damages in the formal complaint does not exceed \$15,000, the shortened method of procedure provided in section 47.20 of the Rule of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleading of the parties are part of the evidence in the case, as is the Department's report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and a reply to respondent's answering statement. Respondent filed an answering statement which was not properly verified, and in addition filed a brief.

FINDINGS OF FACT

1. Complainant, Rocky Produce, Inc., is a corporation with an address at 7201 West Fort Street, Detroit, Michigan.
2. Respondent Ernest Katsias, is an individual doing business as Ernie's Wholesale Produce Co., with an address at 1483 Winder, Detroit, Michigan. At the time of the transaction involved in this proceeding respondent was subject to license under the Act.
3. During the period July 23, 1981, through August 26, 1981, complainant sold to respondent 18 lots of fruits and vegetables, some of which were f.o.b., and all of which were either in interstate commerce or in contemplation of interstate commerce. Respondent received and accepted the produce. The total amount of money involved for the 18 transactions in issue was \$9,631.75, \$234.64 as to which complainant acknowledges respondent made full payment, leaving an amount complainant alleges respondent owes it of \$9,397.11.
4. Between late July 1981 and late September 1981, respondent paid to complainant at complainant's Eastern Market Branch \$6,039.61. Complainant's agent stamped the invoice respondent presented to her with complainant's "paid" stamp, thereby indicating that the invoices had

been paid in full. With respect to the remaining \$3,357.50 there is no evidence that respondent made payment to complainant of those amounts.

5. A formal complaint was filed on March 12, 1982, which was within nine months of the time the causes of action herein arose.

CONCLUSIONS

This proceeding arises as a result of a disagreement between the parties as to whether certain payment made to complainant by respondent should be attributed to the obligations to complainant arising first in time on the part of respondent, or to obligations to which such payments were credited by complainant's agent at the time payment was made. There are 18 individual transactions involved in this proceeding. With respect to six of the transactions involving \$3,357.50 complainant has shown by its invoices that it sold and delivered produce to respondent, and respondent has acknowledged that it received and accepted the produce. Furthermore, complainant having carried its initial burden of proof in this regard, and respondent not having shown that it made payment or that it was entitled to damages with respect to the produce involved, complainant is entitled to judgment in the amount of \$3,357.50.

With respect to the remaining 12 transactions involving \$6,039.61, the answer as to who is correct is not so clear. The evidence shows that complainant has several places of business in Detroit, Michigan, at least two of which provide fruits and vegetables to the respondent. It maintains an accounts receivable ledger at its principal place of business showing respondent's running account. It also appears to maintain an accounts receivable ledger at at least one other place of business. Respondent purchased, during the time at issue, fruits and vegetables from complainant at at least one place of business, and possibly more. It tendered payment along with individual invoices with respect to the 12 transactions involved to complainant's agent, Teresa M. Johnson, at complainant's Eastern Market Branch. Ms. Johnson accepted the payment in the total amount of \$6,039.61 at various times, and stamped the individual invoices tendered by respondent as "Paid". Complainant maintains that such stamp was in error because complainant has a business practice of attributing all payments at its central office to those transactions which are oldest insofar as a customer's account is concerned. Respondent maintains that it is entitled to rely on complainant's notification of payment through the use of a "Paid" stamp. Based on the facts adduced in this proceeding we agree with respondent.

There is no evidence in the record which shows that complainant ever made clear to respondent that its practice with respect to payments received on respondent's account were to be attributed to the oldest

transactions. Although that is a permissible and usual practice, there are other appropriate ways to credit an account. We find that Ms. Johnson, who is the cashier at the Eastern Market Branch of complainant was an employee of complainant, and as such was fully authorized to take the kind of action she did in receiving payment and attributing such payment to a specific transaction.

Respondent had the right to assume that payment was made with respect to those particular transactions when it tendered an invoice and made payment, receiving in return the invoice with the "Paid" stamp on it.¹

Respondent is liable to complainant with respect to the purchase price of fruits and vegetables in six transactions in the total amount of \$3,357.50. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$3,357.50 with interest thereon at the rate of 13% per annum from October 1, 1981, until paid.

Copies of this order shall be served upon the parties.

(No. 22,923)

THE PRODUCE EXCHANGE, INC. v. TOM LANGE CO., INC. PACA Docket No. 2-6237. Decided October 3, 1983.

F.O.B. sale—Suitable shipping condition—Good delivery standards.

Where tomatoes are sold as 85% U.S. No. 1, f.o.b. they have made good delivery when at destination they have condition defects of 25% or less.

*Dennis Becker, Presiding Officer.
Complainant and Respondent, pro se.*

Decision by Donald A. Campbell, Judicial Officer.

¹Interestingly, our finding for respondent in this regard is not particularly harmful to complainant. Respondent apparently still does business with complainant. Therefore, it is likely that a running account continues to be maintained, and if complainant is, indeed attributing payments by respondent to those transactions which occurred earliest in time the transactions with which we are here concerned should soon be paid off by virtue of the use of the running account, if they have not already been paid.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$11,032.95 in connection with the sale two truckloads of tomatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto, denying liability to complainant and asserting a counterclaim for \$1,820.00. Complainant filed an answer to the counterclaim. Since the amount claimed as damages in the formal complaint, and also in the counterclaim, does not exceed \$15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complaint filed a reply to the counterclaim. Complaint also filed a brief.

FINDINGS OF FACTS

1. Complainant, the Produce Exchange, Inc., is a corporation with a business address of 390 Diablo Road, Suite 125, Danville, California.

2. Respondent, Tom Lange Co., Inc. is a corporation with a business address of P.O. Box 4701, Springfield, Illinois. At the time of the transactions involved herein respondent was licensed under the Act.

3. As more fully set forth in paragraphs 4 and 6, below, on or about June 2, 1982, complainant sold to respondent 1,512 twenty five pound boxes of extra large tomatoes which were to be 85% or better U.S. No. 1 combination grade, at \$12.65 per box. Also, as reflected in paragraphs 4 and 6, on or about June 2, 1982 complainant sold to respondent 1,584 twenty five pound boxes of large tomatoes which were to be 85% or better U.S. No. 1 combination grade, at \$10.65 per box. The sale was f.o.b. The tomatoes were shipped in two separate trucks, each of which had both extra large and large tomatoes on it. Complainant invoiced respondent on the basis of the individual truckloads of tomatoes.

4. On or about June 2, 1982, complainant sold to respondent 864 twenty five pound cartons of extra large tomatoes at \$12.65 per carton, f.o.b., for a contract price of \$10,929.60, and 792 twenty five pound cartons of large tomatoes at \$10.65 per carton, f.o.b., for a contract price of \$8,434.80. The total invoice price for this load of tomatoes was \$19,364.40, and was reflected on invoice number 4220. The tomatoes were shipped on

or about June 3, 1982 from their loading point in California to Chicago, Illinois, where they were received and accepted by respondent's customer, J & S Produce Company on or before June 7, 1982.

5. The tomatoes referred in paragraph 4, above, were inspected on June 7, 1982 at the place of business of J & S Produce Company. The inspection showed in pertinent part as follows:

Products Inspected. TOMATOES in cartons printed "Troy Boy, Net Wt. 25 lbs., Green Valley Farms Inc., Brawley, Calif., Produce of U.S.A.", and stamped "EX Lge.-Lgr.," "or" Lge." Applicant states lot consists of 864 cartons of Ex Lge-Lgr and 792 cartons stamped "LGE".

Condition of Load: Each lot: stacked on pallets at above location.

Temperature of Product: In various locations 47° and 48°F.

CONDITION: Ex Lge-Lgr Lot: Average 100% light red and red. No decay. Lge lot: Average approximately 95% light red and red. Decay average 3%. Damage by bruising scattered throughout pack.

Ex. Lge-Lgr Lot: Ranges from 2-10%, average 6% Lge lot ranges from 4 to 10%, average 7%.

Large Lot: Damage by sunken discolored areas occurring mostly over shoulders, some affecting the entire surface ranges from 10 to 26%, average 16%.

6. On or about June 2, 1982, complainant sold to respondent 648 twenty five pound cartons of extra large tomatoes at \$12.65 per carton, f.o.b., for contract price of \$8,197.20, and 792 twenty five pound cartons of large tomatoes at a price of \$10.65 per carton, f.o.b., for a total contract price of \$8,434.80, plus a Ryan recorder at \$22.50. The total invoice price for this load of tomatoes was \$16,654.50, and was reflected on invoice No. 4266. The tomatoes were shipped on or about June 3, 1982 from their loading point in California to Chicago, Illinois, where they were received and accepted by respondent's customer J & S Produce Company on or before June 7, 1982.

7. The tomatoes described in paragraph 6 above, were subjected to a federal inspection on June 7, 1982. The inspection showed in pertinent part as follows:

Products Inspected: TOMATOES in cartons printed "Troy Boy, Net Wt. 25 Lbs., Green Valley Farms Inc., Brawley, Calif., Produce of U.S.A." and stamped "Ex Lge.-Lgr" or Lge." Applicant states lot consists of 648 cartons of Ex Lge-Lgr and 792 cartons of Lge.

Condition of Load: Stacked on pallets on above location.

Temperature of Product: In various locations 55° to 60°F.

Quality: Each lot: Clean, well developed, generally well formed and smooth. Grade defects: Ex Lge-Lgr lot average 10%; Lge lot average 7% each consisting of misshapen and catfaces.

CONDITION: Ex Lge-Lgr lot: average 100% light red. No decay. Lge lot: Average approximately 100% light red and red.

Decay average 2%.

Damage by bruising scattered throughout pack Ex Lge-Lgr lot ranges from 4 to 12%, averages 8%; Lge lot ranges from 4 to 8%; average 6%. Damage by sunken discolored areas mostly over shoulders, some affecting the entire surface: Ex Lge & Lgr lot average 1%; Lge lot ranges from 8 to 28%, average 17%.

GRADE: Each lot: Meets quality requirements but fails to grade U.S. No. 1 only on account of condition.

8. A formal complaint was filed on November 18, 1982, which was within nine months of the time of the transactions involved herein. A counterclaim was filed on March 8, 1983, which was within the time allowed for the filing of such a document.

CONCLUSIONS

Although the parties viewed this case as one which involved a single transaction, there are, in fact, two transactions. This is necessarily the case despite the fact that there was a single oral contract entered into between the parties because there are two shipments of tomatoes from California to Illinois, each of which must be analyzed independently of the other. Complainant avers that insofar as these transactions are concerned it sold to respondent for delivery to respondent's customer in Chicago, Illinois, two truckloads of tomatoes which were to be very nearly ripe, 85% of the tomatoes of which were to be U.S. No. 1 grade. Complainant avers that it sold tomatoes which were in suitable shipping condition when shipped, and that it should be paid the full contract price of \$19,364.40 for one truckload and \$16,454.50 for the other, for a total contract price for the two transactions of \$36,018.90. Respondent, on the other hand, claims in its answer and counterclaim that while the extra large tomatoes in each of the two shipments did meet grade, the large tomatoes were not 85% U.S. No. 1 because of condition defects, as a result of which the respondent breached the warranty of suitable shipping condition implicit in all such contracts. On the basis of this record we must find for the complainant.

The unrefuted evidence is that in June 1982, the tomato market in Chicago, Illinois was such that it was very difficult to find ripe tomatoes. Respondent sought and found two truckloads of such tomatoes in California, and entered into a contract with complainant to purchase them. The tomatoes were segregated by size as extra large and large with a contract price of \$12.65 per 25 pound box for the extra large and \$10.67 per 25 pound box for the large tomatoes. When the tomatoes arrived in Chicago on or before June 7, 1982, complainant's customer J & P Produce Co., had no difficulty with the extra large tomatoes. Respondent received full payment with respect to them, and remitted the con-

tract price attributed to the extra large tomatoes to respondent with respect to each of the two transactions. However, respondent's customer had considerable difficulty with the condition of the large tomatoes, and, while the record is not clear as to how the parties arrived at a resolution, paid respondent less than the full contract price attributed to the large tomatoes. Respondent, in turn, paid complainant less than the contract price attributable to the large tomatoes.

There were inspections taken with respect to both truckloads of tomatoes which show that the extra large tomatoes were 85% or better U.S. No. 1, but that the large tomatoes had significant condition defects. Nevertheless, complainant must prevail. When the same commodity is placed on the same vehicle for transport, it is commingled for purposes of inspection and determinations as to its condition. Therefore, the determination as to whether the tomatoes on each truck were U.S. No. 1 is dependent not on the size of an individual category of tomatoes, but rather on the condition of the entire truckload. The tomatoes are effectively a single commercial unit. Based on the composite inspection results, each commercial unit met the warranty of suitable shipping condition. Under these circumstances, with respect to both transactions we have no choice but to find that the tomatoes were in suitable shipping condition and made good delivery since they were sold as 85% U.S. No. 1. It has been the practice in the trade that when tomatoes are sold as 85% U.S. No. 1, they are considered to have made good delivery when at destination they have condition defects of 25% or less. *Stockton Tomato Co., Inc. v. Albee Tomato Co., Inc.*, 28 Agric. Dec. 1051 (1969).

With respect to the transaction set forth in paragraphs 4 and 5 of the findings of fact we reach this conclusion by adding all percentages of condition defects, as split by the inspector between extra large and large tomatoes, and dividing by two. There was no decay for the extra large tomatoes and 3% decay for the large. Added to that is a total of an average of 6% by bruising for the extra large tomatoes and 7% for the large, plus damage by sunken discolored areas in the average amount of 16% for the large tomatoes. These figures add to a total of 32%. Dividing 32% condition defects by two we find that there is an average of 16% condition defects.¹

With respect to the transaction set forth in paragraphs 6 and 7 of the

¹If we weighted the defects in accordance with the 864 extra large cartons and 702 large cartons the average condition defects would be somewhat lower since 52.2% of the tomatoes were extra large and 47.8% were large. 52.2% of 6% condition defects for the extra large is 3.13%, 47.8% of 26% condition defects for the large is 12.43%. This method of computation results in condition defects of 15.55%.

findings of fact we must reach the same conclusion. Here, however, viewing the matter in the way which most favors respondent we add quality and condition defects to determine whether the tomatoes were 85% U.S. No. 1 when sold. With respect to grade defects the extra large lot averaged 10% and the large lot averaged 7%. As regards condition defects the extra large lot had no decay whereas the large lot had 2% decay. Damage by bruising for the extra large lot was an average of 8% and for the large lot averaged 6%. Damage by sunken discolored areas was 1% for the extra large tomatoes and averaged 16% for the large lot. Adding these figures together we get a total of 50% divided by two which comes to 25% defects.² Although the percentage here is 25% several factors cause us to allow the higher figure. First, the tomatoes were unloaded and stacked at respondent's customer's place of business. Second, there is no indication how long those tomatoes had been unloaded from the truck. Perhaps, most importantly there is no showing as to what the temperature was while they were in transit, and the temperature of the product at the time of the inspection was relatively high for tomatoes so near to being ripe; i.e., 55 to 60°F. Under these circumstances we cannot conclude that the tomatoes were not in suitable shipping when loaded on the trucks.

Because these are f.o.b. transactions, respondent has the burden of proof to show that the tomatoes were not in suitable shipping condition because it accepted them. *Stockton Tomato Co., Inc., v. Albee Tomato Co., Inc.*, *supra*. Respondent failed to sustain its burden of proof. Respondent's failure to pay complainant the difference between \$86,018.90, the contract price for the two loads of tomatoes involved, and \$24,985.95, the amount which it paid, or \$11,032.95, is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$11,032.95, with interest thereon at the rate of 13 per cent per annum from July 1, 1982, until paid.

Respondent's counterclaim is dismissed.

Copies of this order shall be served upon the parties.

²If these were weighted in accordance with the 648 cartons of extra large tomatoes and 732 cartons of large tomatoes the average would be somewhat higher. 45% of the tomatoes were extra large and 55% were large. 45% of 19% defects for the extra large is 8.55%. 55% of 31% for the large is 17.05%. This method of computation results in total defects of 25.60%.

(No. 22,924)

ORANGE-CO OF FLORIDA, INC. v. STAPLES FRESH PRODUCE, INC. PACA
Docket No. 2-6359. Decided October 3, 1983.

Admission of liability.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$5,792.25 in connection with a shipment of citrus fruit in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant in the amount of \$4,750.25, alleging that it had made a payment of \$1,042. Complainant was given an opportunity to dispute respondent's claimed payment, but did not do so. It was thus determined that complainant concurred with respondent's allegation of payment. Accordingly, the issuance of an order against respondent for \$4,750.25 without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Orange-Co. of Florida, Inc. is a corporation whose address is P.O. Box 127, Lake Hamilton, Florida. Respondent, Staples Fresh Produce, Inc., is a corporation whose address is 809 Ewing Avenue, Nashville, Tennessee. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint and respondent's allegation of a \$1,042 payment are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$4,750.25. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$4,750.25, with interest thereon at the rate of 13 percent per annum from April 1, 1983, until paid.

Copies of this order shall be served upon the parties.

(No. 22,925)

LA-MANTIA-CULLUM-COLIER ENTERPRISES, INC. v. ONEONTA TRADING CORPORATION. PACA Docket No. 2-6044. Decided October 5, 1983.

Breach of contract terms—Rejection.

Dennis Becker, Presiding Officer.

Charles W. Hury, McAllen, Texas, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930 as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$12,272.50 in connection with the sale of three truck-loads of packaged carrots in foreign commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer and counterclaim thereto, denying liability to the complainant, and claiming damages in the amount of \$15,423.38. Although the amount claimed as damages in the counterclaim exceeds \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable because neither party requested that an oral hearing be held. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Respondent filed an answering statement. Both parties filed briefs.

FINDINGS OF FACT

1. Complainant, La-Mantia-Cullum-Collier Enterprises Inc., is a corporation with an address of P.O. Box 974 Weslaco, Texas. At the time of the transactions involved herein complainant was licensed under the Act.

2. Respondent, Oneonta Trading Corporation, is a corporation with an address of P.O. Box 549, Wenatchee, Washington. At the time of the transactions involved herein respondent was licensed under the Act.

3. On October 27, 1981 complainant contracted to sell to respondent a truckload containing 800 units of 50# Jumbo Carrots in clear poly bags at \$4.65 per unit plus 35 cents per unit for cooling, f.o.b. The transaction was brokered by The Tobi Company, Inc., Miami, Florida. The carrots were sold for further sale in foreign commerce. On October 29, 1981, the carrots were shipped from Texas to a loading point in Florida for shipment to Trinidad. The carrots were packed in poly-lined

mesh bags. On arrival in Trinidad the carrots were rejected by respondent's customer, Jeewam Rampersad and Son, located in Port of Spain, Trinidad. The fact of the rejection was promptly conveyed to respondent, along with a warning that if two subsequent loads of carrots were also packed in poly-lined mesh bags, they would be rejected. Respondent promptly notified complainant that the shipment had been rejected. Respondent's customer agreed to handle the load of carrots for the account of respondent.

4. On November 4, 1981, complainant contracted to sell to respondent a truckload containing 750 units of 50# Jumbo Carrots in clear poly bags at \$5.15 per unit plus 35 cents per unit for cooling, and \$22.50 for a Ryan recording thermometer, f.o.b. The Tobi Company, Inc. acted as the broker. The carrots were sold for further sale in foreign commerce. On November 5, 1981, the carrots were shipped from the loading point to a port in Texas where they were loaded aboard a ship for further shipment to Trinidad. The carrots were packed in poly-lined mesh bags. On arrival in Trinidad they were rejected by respondent's customer, Jeewam Rampersad and Son, which agreed to handle them for respondent's account. Respondent promptly notified complainant of the rejection.

5. On November 4, 1981, complainant contracted to sell to respondent a truckload containing 750 units of 50# Jumbo Carrots in clear poly bags at \$5.15 a unit plus 35 cents per unit for cooling. The Tobi Company, Inc., acted as the broker. The carrots were sold for further sale in foreign commerce. On November 5, 1981, the carrots were shipped from the loading point in Texas to a port in Texas where they were loaded aboard a ship for further shipment to Trinidad. The carrots were packed in poly-lined mesh bags. Upon their arrival in Trinidad they were rejected by respondent's customer, Jeewam Rampersad and Son, which agreed to handle them for respondent's account. Respondent promptly notified complainant of the rejection.

6. Jeewam Rampersad and Son handled the three shipments of carrots on one accounting. They submitted to respondent an account with respect to their sales which showed that they grossed \$28,851.72 with respect to the 2,300 bags of carrots. Rampersad deducted as its expenses \$6,262.00 for selling costs, brokerage fees, loading and unloading, storage, and drayage, which costs are reasonable. After deducting those costs, Rampersad remitted to respondent \$22,589.52.

7. Respondent incurred costs of \$3,915.52 for inland freight, \$18,974.88 for ocean freight, \$1,125.00 for bank costs, insurance and other miscellaneous costs, and \$1,725.00 as its selling costs at .75 cents per unit, for a total cost to it of \$25,740.40.

8. A formal complaint was filed on April 12, 1982, which was within

nine months of the time the causes of action herein arose. An answer and counterclaim was filed on June 22, 1982, which was timely.

CONCLUSIONS

The essential facts involved in this proceeding are not in dispute. On two dates complainant and respondent contracted with respect to the sale and purchase of three truckloads of 50# Jumbo carrots which were to be shipped in foreign commerce to Trinidad. There is no question but that the parties understood that it was absolutely necessary that the carrots be packed in clear poly bags because that was the requirement imposed by respondent's receiver in Trinidad. The three transactions were brokered by The Tobi Company, Inc., of Miami, Florida. The memorandum of sale, and also the independent statements made by the broker to the Department of Agriculture in a letter to Thomas Walp dated January 20, 1982, show conclusively that Tobi conveyed to complainant that the carrots "must be packed in Clear Poly Bags." Complainant admits that it understood this instruction, but that the carrots were packed in poly-lined mesh bags instead. It is the custom in Trinidad for purchasers of carrots to inspect them before buying, and such inspection cannot be had when the carrots are in poly-lined mesh bags. Therefore, with respect to all three truckloads, complainant breached the terms of the contract. Claims by complainant that the respondent received and accepted the produce knowing of its packaging lack proof on this record. There is no showing that respondent ever physically received the produce, held it, and then shipped it to its customer. Indeed, such would have been virtually impossible since complainant is located in Texas and respondent is located in the State of Washington.

In view of the above complainant can recover only that portion of the purchase price which is greater than damages suffered by respondent. Alternatively, respondent is entitled to any damages which it may have sustained up to the amount of \$15,423.38, the limit it imposed upon itself in its counterclaim. Respondent could have claimed as damages the difference between the purchase price of the carrots and their market price at destination if they had conformed to the specifications set forth in the contracts. However, it did not do so. Rather, it relied upon an accounting based on the handling of the carrots by its customer, Jeewan Rampersad and Son, located in Port of Spain, Trinidad. Rampersad handled the carrots for the account of respondent after rejecting them because they did not conform to the specifications that they be in poly lined bags. Rampersad submitted an account of sales which has not been challenged in this proceeding. Respondent has enlarged upon the account of sales by adding to the cost figures provided its own additional

costs to arrive at its claimed damages of \$15,423.38. As will be discussed below respondent is not entitled to that much money in damages.

Rampersad did not account for each truckload of carrots independently. Rather, for purposes of disposing of the carrots for respondent's account it dealt with all of the carrots as one accounting unit. It showed that it sold 725 fifty pound bags for a total of \$10,481.21, 1020 fifty pound bags for a total of \$12,639.41 and 555 fifty pound bags for a total of \$5,731.10, or all 2,300 bags for a total of \$28,851.72. It remitted to respondent \$22,589.52 after deducting \$6,262.00 for various costs attendant upon its reselling the carrots, such as a 10% charge for selling costs, a 2½% customer brokerage fee, loading and unloading, storage and drayage. We find all these costs to be proper costs involved in handling the goods for the account of respondent, and therefore, allow them.

Respondent claimed that its total costs were \$38,012.90. Involved, however, in that amount were the original purchase prices, costs of cooling and a Ryan recorder invoiced to respondent by complainant. Respondent did not pay complainant for the carrots. Therefore, those costs are disallowed. We find as proper, however, the remaining costs cited by respondent. It was charged inland freight of \$3,915.52, ocean freight of \$18,974.88, bank charges, insurance and miscellaneous charges of \$1,125.00, and claimed a selling cost at 75 cents per unit of carrots of \$1,725.00, for total costs of \$25,740.40. All of these costs are properly chargeable to complainant. Therefore, deducting the \$22,589.52 received by respondent from Rampersad from the \$25,740.40 costs it incurred with respect to the three transactions, we find that respondent has suffered damages in the amount of \$3,150.88. Complainant's failure to pay respondent such amount is a violation of section 2 of the Act for which reparation should be awarded to respondent with interest. Complainant's claim should be dismissed.

ORDER

Within 30 days from the date of this order complainant shall pay to respondent as reparation, \$3,150.88, with interest thereon at the rate of 13 percent per annum from December 1, 1981, until paid.

Complainant's complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,926)

VEG-A-MIX v. REIMAN d/b/a TRI POINTS WESTERN. PACA Docket No. 2-6090. Decided October 5, 1983.

Res judicata—Statute of limitations—Receipt of evidence—Broker's duties—Subterfuge.

Where buyer purchases goods through a broker for a third party to whom seller would not sell directly, seller must look to buyer for payment in the absence of a specific agreement that broker was responsible for payment to the seller by the buyer.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Robert M. Henrichs, Salinas, California, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$4,944.00 in connection with the sale of various vegetables in 5 transactions in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to the complainant. Since the amount claimed as damages does not exceed \$15,000.00 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and a statement in reply. Respondent filed an answering statement. Both parties filed briefs

FINDINGS OF FACT

1. Complainant, Veg-A-Mix, is a corporation with a business address of P.O. Box 1185 Castroville, California.
2. Respondent, Calvin A. Reiman, is an individual doing business as Tri Points Western, with an address at 10 South Filice Street, No. 2 Salinas, California. At the time of the transactions involved herein respondent was licensed under the Act.
3. On May 5, 1981, respondent, acting as a broker, negotiated a contract under which complainant sold to Nielson Produce Company, Idaho Falls, Idaho, 250 cartons of broccoli 14's at \$6.00 per carton, for a total contract price of \$1,500.00, f.o.b. On May 5, 1981, at the direction of

Nielson Produce the brocolli was shipped to Kansas City, Missouri by complainant. Complainant did not know that the produce was to be received by Central Produce at that location.

4. On May 13, 1981, respondent, acting as broker, negotiated a contract under which complainant sold to Nielson Produce Company, Idaho Falls, Idaho, 250 cartons of green onions 4's at \$4.50 per carton plus .65 cents per carton for cooling for a total contract price of \$1,287.50, f.o.b. On May 13, 1981, at the direction of Neilson Produce the onions were shipped to Kansas City, Missouri by complainant. Complainant did not know that the produce was to be received by Central Produce at that location.

5. On May 27, 1981, respondent, acting as a broker, negotiated a contract under which complainant sold to Neilson Produce 150 cartons of broccolli 14's at \$7.00 per carton plus \$22.50 for a Ryan temperature recorder for a total contract price of \$1,072.50, f.o.b. On May 27, 1981, at the direction of Neilson Produce the brocolli was shipped to Kansas City, Missouri by complainant. Complainant did not know that the produce was to be received by Central Produce at that location.

6. On June 4, 1981, respondent, acting as a broker, negotiated a contract under which complainant sold to Nielson Produce 100 cartons of broccolli 14's at \$6.00 per carton plus \$22.50 for a Ryan temperature recorder for a total contract price of \$622.50, f.o.b. On June 4, 1981, at the direction of Neilson Produce the broccoli was shipped to Kansas City, Missouri by complainant. Complainant did not know that the produce was to be received by Central Produce at that location.

7. On June 15, 1981, respondent, acting as a broker, negotiated a contract under which complainant sold to Neilson Produce 100 cartons of green onions 4's at \$4.00 per carton plus .45 cents per carton for cooling and \$16.50 for a temperature recorder for a total contract price of \$461.50, f.o.b. On June 15, 1981, at the direction of Neilson Produce the onions were shipped to Kansas City, Missouri by complainant. Complainant did not know that the produce was to be received by Central Produce at that location.

8. Central Produce, of Kansas City, Missouri, received and accepted the five shipments of produce set forth in paragraphs 3 through 7 above. Central Produce was supposed to pay Neilson Produce for these shipments. Neilson produce was to pay complainant regardless of whether it received payment from Central Produce. Neilson Produce did not pay complainant for any of the five shipments set forth in paragraphs 3 through 7, above.

9. An informal complaint was filed on February 10, 1982, which is within nine months of the time the causes of action herein arose.

DISCUSSION

This case arises as a result of a situation in which Central Produce of Kansas City, Missouri, lacking adequate financial resources or its own credit rating, utilized the credit rating of Neilson Produce Company to secure produce. It did this by arranging to have Neilson Produce buy agricultural commodities Central desired, and instructing the seller to have them shipped directly to Central Produce. Apparently, by this method it was able to obscure the fact that it was purchasing such produce.

With respect to the five transactions involved in this proceeding complainant filed a complaint against Neilson Produce prior to filing the complaint involved here. On November 16, 1981, a default order was issued in favor of complainant against Neilson Produce. Respondent maintains that this default order is *res judicata* as regards the transactions involved in this proceeding. Such is not the case. The issues in the two proceedings are different. In the Neilson Produce Company case the issue was whether Neilson owed complainant the money because it had failed to pay it. In this proceeding the issue is whether respondent owes complainant \$4,944.00 because it has violated its responsibility to complainant as a broker.

Respondent maintains that because the formal complaint in this proceeding was filed June 15, 1982, which is more than 9 months after the transactions involved occurred, the statute of limitations provided in 7 U.S.C. 499f(a) of the PACA prohibits the bringing of this proceeding. Such is not the case. It has long been held that the filing of an informal complaint tolls the statute of limitations. *The Auster Company, Inc. v. Nash-DeCamp Company*, 19 Agric. Dec. 1299, 1304 (1960). The informal complaint was filed on February 10, 1982, well within the nine month statute of limitations.

Respondent also claims that an attachment to the statement in reply filed by complainant of a letter from Neilson Produce Company was new evidence filed beyond the time period in which evidence may be received. Respondent is in error. There is no prohibition under the Rules of Practice for the receipt of evidence through the filing of a statement in reply. Indeed, to so proscribe the receipt of evidence would hinder the proper course of a proceeding of this nature because it might be necessary after respondent files new evidence in its answering statement for a complainant to file rebuttal evidence.

Turning to the major issue in this case, complainant maintains that respondent violated its duty to it as a broker to provide all information with respect to the transactions in issue which was in its possession.

Complainant avers that respondent knew at all times that Central Produce was to receive the perishables purchased from complainant by Neilson Produce, but that respondent failed to provide this information to complainant despite the fact it knew complainant would not sell any produce destined for Central Produce. Even accepting as true complainant's allegations that respondent knew all of this information, we must nevertheless find for respondent. There is no question but that complainant entered into a contract with Neilson Produce, and looked to Neilson Produce for payment. This is particularly borne out by the fact that it filed an action against Neilson Produce seeking such payment, and did not file the instant action until sometime subsequent to the issuance of a default order in that proceeding.

To hold that a broker must provide all information in its possession to both parties would unduly hamper the ability of parties to enter into transactions. There is no necessary nexus between the failure of Neilson Produce to pay complainant and respondent's knowledge that the goods were destined for Central Produce. Additionally, complainant knew at the time it shipped the goods that they were going to Kansas City, Missouri, and not to Idaho where Neilson Produce was located. If complainant were concerned about the alternate destination of the produce, it could have made inquiry. It did not do so. As is set forth in 7 U.S.C. §47.28(b) "Unless otherwise specifically agreed, the broker does not guarantee the performance of the contracting parties." As set forth in 7 CFR 46.28(c) "In the absence of a specific agreement, a broker is not responsible for payment to the seller by the buyer." In view of these regulatory provisions, complainant must look to the buyer for payment, and cannot seek payment from a collateral source when it does not achieve its purpose. The complaint must be dismissed.

ORDER

The complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,927)

MAGIC VALLEY POTATO SHIPPERS, INC. v. C. B. MARCHANT & Co., INC. and GENE MORRIS Co., INC. PACA Docket No. 2-6128. Decided October 5, 1983.

F.O.B. sale—Breach of contract—Acceptance by diversion—Rejection without reasonable cause—Suitable shipping condition warranty—Transportation services.

Where seller failed to ship and deliver commodity on dates agreed upon, it breached the

contract; but buyer accepted the goods when it diverted them to another destination. Buyer's rejection after acceptance was rejection without reasonable cause. The warranty of suitable shipping condition is applicable because a contract destination was agreed upon, however transportation services were abnormal thus voiding the warranty.

George S. Whitten, Presiding Officer.
Complainant and Respondents, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$9,900 in connection with the sale of a carload of potatoes in interstate commerce.

A copy of the Report of Investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon the respondents which filed a joint answer thereto, denying liability to complainant. The amount claimed in the formal complaint does not exceed \$15,000.00. Accordingly, the shortened method of procedure provided in the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered as evidence in the proceeding. In addition, the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondents filed a joint answering statement, and complainant filed a statement in reply. None of the parties filed a brief.

On page 7 of its opening statement, complainant requested that the complaint be amended to recover an additional \$2,997.35 in connection with a second carload of potatoes allegedly sold to C.B. Marchant Co., Inc., through Gene Morris Co., Inc., acting as broker. This request that the complaint be amended was buried in the body of complainant's opening statement and there was no heading demarcating the request as such. The Rules of Practice (7 CFR 47.6(d)) provide that amendments "subsequent to the filing of an answer by the respondent may be made only with leave of the examiner or with the written consent of the adverse party." It is not the usual practice for statements submitted pursuant to the shortened procedure to receive a detailed reading prior to the referral of a case to the presiding officer for preparation of the examiner's report. Consequently, complainant's request was not noted and "leave of the examiner" was not obtained. In addition, complainant's opening statement was filed on November 16, 1982, which was more

than nine months after the cause of action alleged in connection with the second carload of potatoes accrued. For both of these reasons, we deem the complaint in this matter not to have been amended.

FINDINGS OF FACT

1. Complainant, Magic Valley Potato Shippers, Inc., is a corporation whose address is P.O. Box 585, Paul, Idaho.

2. Respondent, C.B. Marchant & Co., Inc., is a corporation whose address is Columbia State Farmer's Market, Columbia, South Carolina. At the time of the transaction involved herein, this respondent was licensed under the Act.

3. Respondent, Gene Morris Co., Inc., is a corporation whose address is P.O. Box 13552, Columbia, South Carolina. At the time of the transaction involved herein, this respondent was licensed under the Act.

4. On or about November 6, 1981, complainant sold to respondent C.B. Marchant & Co., Inc. (hereafter Marchant), through respondent Gene Morris Co., Inc. (hereafter Morris), acting as broker, one railway carload of potatoes consisting of 2,200 - 50 pound burlap sacks of U.S. No. 1 bakers, at \$9.00 per cwt., f.o.b., to be shipped on November 10, 1981, to Kraft Foods in Charlotte, North Carolina for arrival on November 19, 1981.

5. On or about November 17, 1981, complainant shipped the carload of potatoes from Granada, California, to respondent's customer Kraft Foods, Charlotte, North Carolina. Respondent diverted the carload of potatoes while en route to its place of business in Columbia, South Carolina. The carload of potatoes arrived in Columbia, South Carolina on the morning of December 3, 1981. The car was placed at 3:30 A.M. on December 4, 1981, and was opened by respondent at 2:00 P.M. on the same day. Marchant noted decay in the potatoes, called Morris and informed it of such decay. Morris relayed the message to complainant, and complainant requested that Marchant try to handle the potatoes. Later in the afternoon after Marchant made a more extensive examination of the potatoes in the car it concluded that the condition of the potatoes was worse than first noted and so informed Morris. Morris again called complainant at approximately 4:30 P.M., and complainant requested that an inspection be made of the potatoes.

6. At 7:15 a.m. on December 7, 1981, Marchant requested a federal inspection of the potatoes. At 10:00 a.m. on December 7, 1981, the potatoes were federally inspected at respondent marchant's place of business with the following results in relevant part:

CAR NO.:
KIND:

SPFE 456075 "SC Remarks"
Mechanical Refrigerator

Cite as 42 A.D. 1602

WHERE INSPECTED: State Farmers Market Columbia, SC
Condition of Equipment: Temperature Control operating.
Products Inspected: Long Russet POTATOES in burlap sacks printed "U.S. NO. 1 Potatoes Packed By Cherry Farms Macdoel, Calif. 96058 Granada, Calif. 96038 net wt. 50 lbs. 22.7Kg. Produce of U.S.A. or printed "Pride o'The Valley Potatoes U.S. No. 1 Sterling Riley Macdoel Ca. 96058 net wt. 50 lbs. 22.7 Kg. Produce of U.S.A.". Applicant's agent states 1200 sacks remaining in car and 1000 sacks on warehouse floor "See Remarks".
Condition of Load: Car partly unloaded, 7 stacks in (A) end of car, 6 stacks in (B) end of car, 9 or 10 rows, 9 or 10 layers lengthwise. Unloaded Lot: Stacked on pallets at above location. Each lot: Many sacks show wet spots from 3 to 5 inches in diameter. Loaded Lot: Each end of car, bottom 48 degrees F. top 46 degrees F.
Temperature of Product: Temperature ranges from 48 degrees F., to nearly 50 degrees F.
Unloaded Lot: Condition: Each lot: Generally firm. Average 1% damage by Fusarium Tuber Rot (dry type). Soft Rot in most samples from 2% Tuber type soft to 12%, in some samples none, average 5% Slimy Soft Rot in advanced stages.
Remarks: Applicant's agent states unloaded lot was unloaded from above mentioned car. Inspection and certificate restricted to product and lading of upper 5 layers in each end of car and unloaded lot in warehouse.

7. After receiving the results of the Federal Inspection on the afternoon of December 7, 1981, respondent Marchant gave notice to complainant that the carload of potatoes was rejected. After this notice complainant requested that Gene Morris find a buyer for the potatoes. Respondent Morris could find only one buyer for the potatoes. This buyer, Case Produce, agreed to purchase the potatoes for the amount of the freight bill.

8. The formal complaint was filed on July 12, 1982, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondents in their joint submissions maintained throughout this proceeding that the subject potatoes were purchased on November 6, for shipment on November 10 and arrival on November 19. Complainant nowhere directly denies this allegation. Accordingly, we find that complainant breached its contract to ship on November 10 for delivery on November 19, 1981.

The Uniform Commercial Code Section 2-713 provides in relevant part that:

... the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

Respondents made no effort to prove damages resulting from complainant's breach of contract, nor did respondents claim that there were any damages resulting from such breach. In the absence of such claim or proof there is no way we can award damages to respondent.

The record clearly reveals that while complainant did not ship the potatoes in a timely manner, it did ship potatoes to respondent Marchant. Furthermore, it is clear that respondent Marchant's diversion of the potatoes while they were en route to Charlotte, North Carolina amounted to an acceptance of such potatoes. *Lindemann Farms v. Food Fair Stores*, 36 A.D. 92 (1977). Respondent Marchant's notice of rejection, following its acceptance of the potatoes was a "rejection without reasonable cause" (see 7 CFR 46.2(bb)), and accordingly a violation of section 2 of the Act (7 U.S.C. 499b(2)). However, the legal consequences of such an action are in most cases (as here) the same as those which result from an acceptance. See *Leonard O'Day Co. v. Wm. F. Helm & Son*, 16 A.D. 1037 (1957). Consequently, respondent Marchant became liable to complainant for the full purchase price of the potatoes less any damages flowing from any breach of contract on the part of complainant. See *Ebia Produce Co., v. Riojas Produce*, 22 A.D. 1390 (1963) and *Leonard O'Day Co.*, *supra*. Since the potatoes were sold under f.o.b. terms there was a warranty, as provided in the regulations (7 CFR 46.43(i) and (j)) that the produce was in suitable shipping condition. The regulations define "suitable shipping condition" as meaning:

... that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.

Complainant claims that the warranty is not applicable because no contract destination was agreed upon between the parties. However, the record clearly shows that a contract destination was agreed upon, namely Charlotte, North Carolina. The diversion of the car to a different destination than that specified in the contract would not necessarily leave respondent totally without benefit of the warranty since the condition of the commodity at that different point may be relevant in de-

termining whether the commodity would have been abnormally deteriorated at the destination specified. See *A. R. Lettuce v. Senini*, 15 A.D. 997 (1956); *Corte & Sons v. Lerner & Son*, 14 A.D. 320 (1955) and *United Packing Co. v. Schoenburg*, 13 A.D. 175 (1954). However, the regulations make it clear that the warranty of suitable shipping condition is applicable only if transportation services and conditions are normal. In this case the arrival of the car at Columbia, South Carolina, on December 3 or 4, following shipment on November 17, constitutes an extremely excessive transportation period. We find the transportation services were abnormal and that accordingly the warranty of suitable shipping condition was voided. Since respondent Marchant has not succeeded in proving a breach of warranty on the part of complainant such respondent is liable to complainant for the full purchase price of the potatoes, or \$9,900.00. Respondent Marchant's failure to pay complainant this amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

The complaint in this matter was framed in such a manner as to allege the joint liability of respondent Morris with respondent Marchant. However, it is clear from the record that respondent Morris acted only as a broker relative to the carload of potatoes, and furthermore, the record nowhere reveals any violation of the Act by respondent Morris for which such respondent would be liable in damages to complainant. Accordingly the complaint against respondent Morris should be dismissed.

ORDER

Within thirty days from the date of this order, respondent C. B. Marchant & Co., Inc., shall pay to complainant, as reparation, \$9,900, with interest thereon at the rate of 13% per annum from January 1, 1982, until paid.

The complaint against respondent Gene Morris Co., Inc., is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,928)

H. J. L., INC. v. GILARDI TRUCK & TRANSPORTATION, INC. PACA
Docket No. 2-6166. Decided October 5, 1983.

Failure to pay.

George S. Whitten, Presiding Officer.

Charles W. Daley, Lima, Ohio, for complainant

Gary E. Susser, Dayton, Ohio, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$9,945.00, in connection with numerous transactions involving the sale of mixed perishable commodities which moved in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability to complainant.

The amount claimed as damages herein does not exceed \$15,000.00. Accordingly, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the verified pleadings of the parties are considered part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, H. J. L., Inc., is a corporation whose address is P.O. Box 251, Lima, Ohio.
2. Respondent, Gilardi Truck & Transportation, Inc., is a corporation whose address is 2355 Wapak Road, Sidney, Ohio. At the time of the transactions involved herein, respondent was licensed under the Act.
3. Between January 25, 1982, and February 26, 1982, complainant sold and shipped to respondent numerous partial truckloads of mixed perishable commodities which complainant received from outside the State of Ohio. The total price of the produce shipped between January 25 and February 26, 1982, was \$10,128.75. Respondent has paid complainant \$183.75 of this amount leaving a balance still due of \$9,945.00.
4. The formal complaint was filed on October 7, 1982, which was within nine months after the causes of action herein accrued.

CONCLUSIONS

Complainant filed a sworn complaint in which it set forth the basic allegations of the sale and shipment to respondent of mixed perishable commodities received from outside the State of Ohio having the total

agreed contract price of \$10,128.75. Complainant also attached to the sworn complaint documentation in the form of invoices showing the sale of such produce to respondent. Complainant alleges in the sworn complaint that all the produce was picked up by respondent at complainant's place of business.

The only response filed in this proceeding by respondent is the answer to the complaint which is merely a general denial to the substantive allegations thereof. We conclude on the basis of all the evidence of record that complainant has adequately proven that the subject produce was sold and delivered to respondent, and that respondent has failed to pay a balance due of \$9,945.00. Respondent's failure to pay such amount to complainant is a violation of section 2 of the Act, for which reparation should be awarded to complainant, with interest.

ORDER

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, \$9,945.00, with interest thereon at the rate of 13 per cent per annum from March 1, 1982, until paid.

Copies on this order shall be served upon the parties.

(No. 22,929)

HOMESTEAD TOMATO PACKING CO., INC. *v.* WEST COAST PRODUCE CO., INC. PACA Docket No. 2-6183. Decided October 5, 1983.

Failure to submit accounting covering resale.

George S. Whitten, Presiding Officer.
Complainant and Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$1,500 against respondent in connection with the sale and shipment to respondent in interstate commerce of one truckload of tomatoes.

A copy of the report of investigation prepared by the Department

was served on each of the parties. A copy of the formal complaint served on respondent which filed an answer thereto denying liability to complainant.

The amount of damages claimed herein does not exceed \$15,000 and accordingly the shortened method of procedure provided in the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are considered a part of the evidence, as is the Department's report of investigation. In addition, the parties were given the opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose address is P.O. Box 3064, Florida City, Florida.

2. Respondent, West Coast Produce Co., Inc., is a corporation whose address is 1500 S. Zarzamora Street, San Antonio, Texas. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about January 5, 1982, complainant sold to respondent one truckload of tomatoes, consisting of 1,760 cartons of size 5x6, Poppa's Famous brand, at \$2 per carton, plus additional amounts for palletization and brokerage in the total amount of 45 cents per carton, plus \$22.50 for a Ryan temperature recorder, or a total of \$4,334.50 F.O.B.

4. The tomatoes were shipped from Florida City, Florida at 6:15 p.m. on Tuesday, January 5, 1982, and arrived at respondent's place of business in San Antonio, Texas, during the late afternoon on January 7, 1982. Respondent unloaded the tomatoes from the truck and placed them in its cooler. Respondent began to process the tomatoes on Saturday, January 9, and noted some problems in the tomatoes. On Monday, January 11, 1982, respondent requested a Federal inspection of the tomatoes and such inspection was made at 7:05 a.m. on that date with the following results in relevant part:

WHERE INSPECTED: Unit 318 P.T.M.

Products Inspected:

TOMATOES in Cartons printed "Poppa's Famous Tomatoes, grown by Strano Farms, packed and shipped by Homestead Tomato Packing Co., Inc., Florida City, Florida, net Wt., 20 lbs., Produce of U.S.A." Cartons also stamped "5x6 & Lgr. Ripe." Applicant states 1,672 cartons of Florida stock. Stacked on pallets at above location.

Condition of Load:

Cartons well filled. Jumble pack.

Condition of Pack:

Various locations: 48 to 50°F.

Temperature of Product:

Averages approximately 65% light red and red.

Condition:

Decay ranges from 3 to 75%, average 34% Alter-

naria Rot and Anthraenose Rot each in all stages, mostly advanced, many early. Averages 6% damage by numerous sunken discolored areas. Serious damage by bruising ranges from 9 to 27%, averages 15%

Remarks: Appellant states above lot was unloaded on January 7, 1982.

5. Respondent has paid complainant \$2,834.50 leaving a balance still due on the purchase price of \$1,500.00.

6. An informal complaint was filed on August 2, 1982, which was within 9 months after the cause of the action herein accrued.

CONCLUSIONS

The percentage of decay and other condition defects as shown by the Federal inspection made on January 11, 1982, is very excessive. However, tomatoes are a highly perishable commodity and an inspection made on the fourth day after arrival cannot be expected to accurately reflect the condition of the tomatoes at the time of arrival. For this reason we are always reluctant to find a breach of contract based on an inspection as remote in time from the date of arrival as this one. See *Pan-American Fruit Company v. Halen Hazzouri*, 25 A.D. 681 (1966) and *Pete's Condakes Co. v. Michael Bros.*, 19 A.D. 650 (1960). We are particularly reluctant to do so in this case since respondent could easily have requested and secured a Federal inspection on Friday, January 8.

In spite of these factors, it is not necessary for us to decide the issue of whether complainant breached the contract of sale, since respondent failed to submit an accounting covering the resale of the subject tomatoes, and such failing precludes us in this case from awarding damages to respondent even if we were to conclude that there was a breach of contract. *Anthony Brokerage v. The Auster Company*, 38 A.D. 1643 (1979). Respondent accepted the tomatoes, and therefore, became liable to complainant for the full purchase price thereof. Respondent has paid complainant \$2,834.50 which leaves a balance still due and owing of \$1,500.00. Respondent's failure to pay such amount to complainant is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,500, with interest thereon at the rate of 13% per annum from February 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,930)

DYNASTY FARMS, INC. v. DAN GARCIA BROKERAGE, INC. PACA Docket No. 2-6353. Decided October 5, 1983.

Admission of liability.

Andrew Y. Stanton, Presiding Officer.
Complainant and Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$29,439.34 in connection with a shipment of lettuce in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant in the amount of \$28,913.09, contesting the remaining \$526.25. Complainant failed to respond when asked whether it wished to withdraw its complaint for the \$526.25 and informed that a failure to respond would result in the issuance of an order for \$28,913.09. It was thus determined that complainant had withdrawn its claim for \$526.25. Accordingly, the issuance of an order against respondent for \$28,913.09 without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 47.8(d)).

Complainant, Dynasty Farms, Inc., is a corporation whose address is P.O. Box 1933, Salinas, California. Respondent, Dan Garcia Brokerage, Inc., is a corporation whose address is P.O. Box 999, Nogales, Arizona. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint as amended by complainant are hereby adopted as findings of fact of this order. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$28,913.09. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$28,913.09, with interest thereon at the rate of 18 percent per annum from March 1, 1983, until paid.

Copies of this order shall be served upon the parties.

(No. 22,931)

WATSON DISTRIBUTING v. FRUIT UNLIMITED, INC. PACA Docket No. 2-5939. Decided October 13, 1983.

Transportation services and conditions.

George S. Whitten, Presiding Officer

Complainant, *pro se*

Henry G. Piano, Milwaukee, Wisconsin, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$15,264.00, in connection with the sale to respondent of a truckload of fresh fruit containing peaches, plums, and nectarines which were shipped in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant, and asserting a counterclaim in the total amount of \$28,552.00 arising out of the same transaction. Complainant filed a reply to the counterclaim denying any liability thereunder.

Respondent requested an oral hearing and such hearing was held in Milwaukee, Wisconsin, on August 19, 1982. Two witnesses testified on behalf of the complainant and a deposition was received in evidence on behalf of respondent. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, James H. Watson, is an individual doing business as Watson Distributing, whose address is 4568 E. Kings Cyn. Rd., Fresno, California. At the time of the transaction involved herein complainant was licensed under the Act.

2. Respondent, Fruit Unlimited, Inc., is a corporation whose address is 1100 South Barclay Street, Milwaukee, Wisconsin. At the time of the transaction involved herein respondent was licensed under the Act.

3. On or about June 2, 1981, complainant sold to respondent one truckload of mixed fruit as follows:

Cite as 42 A.D. 1613

19 Lugs nectarines 70s	@ \$ 7.15 f o.b.	\$ 135.85
245 Lugs nectarines 60s	@ 7.15 f o.b	1,751.75
180 Volume fill nectarines 96s	@ 6.15 f.o.b.	1,107.00
180 Lugs Dorado plums 3 x 4	@ 15.15 f.o.b.	2,727.00
218 Lugs Dorado plums 4 x 4	@ 12.15 f.o.b.	2,587.95
87 Lugs Dorado plums 4 x 5	@ 10.15 f.o.b.	883.05
264 Lugs peaches 60-64s	@ 7.15 f.o.b.	1,887.60
198 Lugs peaches 70s	@ 5.15 f.o.b.	1,019.70
264 Lugs peaches 56s	@ 8.15 f.o.b	<u>2,151.60</u>
		14,251.50
1650 Precool and palletization	@ .60 f.o.b.	990.00
Recorder		<u>22.50</u>
		<u>\$15,264.00</u>

4. The contract between the parties was negotiated by a broker, Tri-Points Western of Salinas, California.

5. Complainant shipped the truckload of produce from Reedley, California on June 2, 1981, to respondent in Milwaukee, Wisconsin. The truck of produce arrived on June 5, 1981, at respondent's place of business and the broker instructed respondent not to unload until an inspection could be obtained. Respondent, however, examined the fruit and notified the broker that it had unloaded four pallets of merchandise and found it to be frozen. Respondent then unloaded the remainder of the fruit and placed it in its cooler.

6. On June 6, 1981, at 5:00 a.m. a federal inspection was made of the fruit while in a cooler at respondent's place of business in Milwaukee, Wisconsin, with the following results in relevant part:

Products
Inspected.

PLUMS, NECTARINES and PEACHES in separate cartons stamped "Dorado Plums, Net Wt. 28 lbs. Fed State Insp. 529 861 "Smeds Packing Co. Reedley, Ca.," and marked 3x4, 4x4 or 3x4x4" or cartons stamped "Arinking Nectarines Fed State Insp. 527-874, 25 lbs. Net Wt." and marked "96 count" or cartons stamped Spring Crest Peaches, Fed State Insp. 601-871 and marked 64, 72, 56, and each carton printed "Hosaka, Reedkey (sic.), California, Produce of USA." Applicant states lot consists of 444 cartons of Nectarines, 700 cartons of Peaches, and 500 cartons of Plums.

Condition of Load:
Condition of Pack:

Each lot: Stacked on pallets in applicant's cooler
Plum lot: Well filled, jumble pack. Remaining lots: Fairly tight in molded trays.

Temperature of Product:
Condition:

In various locations 45°, 46°, 47°, and 48°F.
In generally all top layer and in some of second top layer of Peach lot, and in some of top layers of Plum and Nectarine lot stock shows freezing injury. Affected stock is watersoaked and

Cite as 42 A.D. 1613

translucent in appearance extending in from tops from approximately 1 to 3 inches. Location indicates freezing occurred after packing but not in present location.

Remarks: Inspection and certificate restricted freezing only at applicant's request.

7. On June 10, 1981, at 10:25 a.m. 200 cartons of the nectarines were subjected to federal inspection while stacked on pallets in respondent's cooler with the following results in relevant part:

Temperature of Product:

In various locations 48° to 52°F.

Condition:

Mostly ripe. Ground color mostly yellow, some orange. Damage by bruising, scattered throughout pack, ranges 10 to 40%, average 28%. Decay ranges 10 to 60%, average 31%, Rhizopus Rot in early stages.

8. The Ryan temperature recorder tape taken from the truck shows a drop in temperature during the first six hours from 68° to 40°, a further drop during the next three hours to approximately 36 to 37° where the trace continued until approximately the 16th hour. From the 16th hour to the 18th hour the tape showed a rise in temperature to 40° where the trace continued until approximately the 28th hour before dropping back to approximately 37° at the 30th hour. The tape continued at approximately 37° through the 40th hour. From the 40th hour to the 49th hour the tape rose from 37° to approximately 45° and then dropped gradually back to 37° at the 61st hour and rose gradually to approximately 40° at the 66th hour.

9. The formal complaint was filed on July 17, 1981, which was within 9 months after the cause of action herein accrued.

CONCLUSIONS

It is clear from the record that respondent accepted the load of mixed fruit by unloading such fruit from the truck and placing it in its cooler. Consequently respondent became liable to complainant for the full purchase price of the fruit less any damages flowing from any breach of contract proven by respondent. The burden of proving a breach rests upon respondent. *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 A.D. 511 (1969).

The overriding issue in this proceeding, which is apparent on the face of the record, concerns where the freezing injury disclosed by the federal inspection of June 6, 1981, occurred. Since the sale of the fruit was on a f.o.b. basis respondent would bear responsibility for any freezing which occurred after the loading of the fruit on the truck. On the other hand if it can be shown that transportation services and conditions were

normal then the freezing must have occurred prior to loading and the responsibility for such freezing would rest upon complainant. Where a buyer accepts a commodity the burden of proving that transportation services and conditions were normal rests upon such buyer. *Dave W. Walsh v. Rozak's*, 39 A.D. 281 (1980).

While the temperature tape that was taken from the truck does not disclose freezing temperatures it does show that for a substantial amount of time the temperatures registered on the tape were in the 36 to 37° range. Of course a temperature tape does not register the temperature of the fruit or necessarily the temperature of the air as it comes out of the cooler but rather the temperature of the air in a trailer at the point at which the Ryan temperature recorder is hanging. In a letter dated August 20, 1981, and made a part of the Department's report of investigation, complainant raised the question of whether this particular truck was equipped with an air deflector chute to direct the air coming from the refrigeration unit away from the top of the load and to the back of the trailer. Complainant also questioned whether the trailer might not have had a chute which came only part way back in the trailer. On September 3, 1981 the regional director of the Mid-Western region of the regulatory branch of the Fruit and Vegetable Division wrote to respondent as follows:

I have received another letter from complainant which comments on the instrument recording tape which you refer to in your correspondent (sic) addressed to us. I am enclosing for your reference a photocopy of complainant's letter and specifically call your attention to paragraph 3. We are aware of numerous instances whereby produce exposed to the direct blast of air from the refrigeration unit can freeze the top layers of produce on such shipments. It is noted the inspection furnished by you states the following in part:

In generally *all top layer* and in some of *second top layer* of Peach lot, and in *some of top layers* of Plum and Nectarines lot stock shows freezing injury. Affected stock is watersoaked and translucent in appearance *extending in from tops* from approximately 1 to 3 inches. Location indicates freezing occurred after packing but not in present location.

You will note from the inspector's description of the position of freezing that it was restricted to the top layer and in some second top layers of the peach lot and of the top layers of the plum and nectarine lot. There is no indication by the certificate that the remaining layers of the fruit were frozen. This defi-

nately lends support to complainant's theory that the freezing probably occurred during transit.

Respondent was instructed by the broker not to unload the produce from the truck until a federal inspection could be obtained. Respondent disregarded this advice and did unload the truck prior to inspection. If the inspection had been of the produce while still on the truck such inspection would very likely have shown, from the position of the freezing, whether such freezing took place on the truck or not. Respondent was responsible for removing the produce from the truck and respondent also had the burden of proving, since it accepted the produce, that transportation services and conditions were normal. We find that respondent has not met this burden of proof, and consequently find that transportation services and conditions were abnormal. The warranty of suitable shipping condition is therefore voided.

Since respondent accepted the produce, and has not proven a breach of contract on the part of complainant, respondent is liable to complainant for the full purchase price of the produce, or \$15,264.00. Respondent's failure to pay complainant such amount is a violation of Section 2 of the Act for which reparation should be awarded to complainant with interest. The counterclaim should be dismissed.

Complainant submitted a claim for expenses incurred in connection with the hearing in the total amount of \$1,007.07. Respondent objected to this claim on several grounds. First, respondent says that since Mr. Watson was a party in interest and not an attorney he should not be entitled to attorney fees. We agree. However, Mr. Watson did not claim attorney fees. He merely placed his claim for expenses on the wrong line on the suggested claim form, a fact which an examination of the attachment detailing those expenses makes clear.

Second, respondent objects to the car rental fee claimed by complainant in the amount of \$63.29, stating that the cost of an airport limousine, one way, from the airport to the place of hearing would have been \$5.50. We agree that no justification has been shown in this case for car rental expenses, since transportation by airport limousine and cab would likely have been less expensive. However, complainant obviously transported both himself and C.A. Reiman, complainant's witness, so the admitted round trip costs of the airport limousine would have been \$22.00. In addition complainant would have been allowed reasonable cab fare between the place of hearing and his hotel, but no claim for any such fare was submitted. Accordingly we will allow \$22.00 in place of complainant's \$63.29 claim for car rental fee.

Third, respondent objects to the coach air fares of both complainant (one way) and C.A. Reiman (round trip) on the basis that cheaper super

coach fares were available. However, respondent did not adequately document these alternative fare rates nor show that they were not subject to travel restrictions which would have made them unusable by complainant.

Fourth, respondent objected to the \$77.00 hotel bill for one day as well as the food bills (totalling \$17.88 for refreshments and one meal or two) for Mr. Watson on the grounds that such bills show two guests in the hotel and for the meals. However, it is obvious from C.A. Reiman's failure to submit a hotel bill and from his submission of a food bill for one meal with two guests in the amount of 21.00, that complainant and his witness shared a room and meals. Respondent also objects to these amounts because allegedly only \$16.00 per day is allowable as subsistence. However, as was explained on the record at the hearing, the \$16.00 amount shown on the suggested claim form is no longer applicable. The amount now allowed is the same as the amount of subsistence allowed by the General Services Administration for federal workers at the location in question, in this case \$74.00 per person per day. See 28 U.S.C. §1821(d)(2); and 46 Fed. Reg. 58366 (1981). We conclude that the amounts claimed for subsistence (one day's food and hotel for two people) totalling \$116.58 is reasonable.

Respondent also objects to the allowance of any amount for C.A. Reiman because "he was not a subpoenaed witness and appeared voluntarily . . . whereas . . . in federal courts only subpoenaed witnesses are normally entitled to their expenses . . ." However, the analogy will not hold, as we are here dealing with a statutory provision specifically allowing to the prevailing party "reasonable fees and expenses incurred in connection with any . . . hearing." 7 U.S.C. 499g.

The total allowable expenses which we have found to be due to complainant from respondent are \$965.58. Complainant should be awarded additional reparation in this amount.

ORDER

Within 30 days of the date of this order, respondent shall pay to complainant, as reparation, \$15,264.00, with interest thereon at the rate of 13% per annum from July 1, 1981, until paid.

Within 30 days from the date of this order, respondent shall pay to complainant, as additional reparation for expenses incurred in connection with the oral hearing, \$965.58, with interest thereon at the rate of 13% per annum, from the date of this order until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,932)

VEG-A-MIX v. GEORGE DEPAOLI DISTRIBUTING COMPANY, PACA Docket No. 2-6108. Decided October 13, 1983.

P.O.B. sale—Acceptance—Transportation services and conditions—Inspection—Suitable shipping condition—Damages.

When respondent unloaded the tomatoes late Friday it accepted them, but inspection on the following Monday is timely. Where transportation services and conditions were normal, the federal inspection shows that the tomatoes were not in suitable shipping condition when shipped. Damages were awarded on basis of percent of defects.

George S. Whitten, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant requests an award of reparation against respondent in the amount of \$440 in connection with a transaction in interstate commerce involving a lot of cherry tomatoes.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages in the formal complaint does not exceed \$15,000, the shortened procedure set forth in the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties together with the Department's report of investigation are considered as evidence. In addition the parties were given the opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and respondent was given an opportunity to file an answering statement but did not do so. Subsequently, respondent filed a petition to reopen the hearing and, after service on complainant, and consideration of complainant's objections thereto, the hearing was reopened and an answering statement on behalf of respondent was received in evidence. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Veg-A-Mix is a corporation whose address is P.O. Box 1185, Castroville, California.

2. Respondent, George DePaoli Distributing Company, is a corporation whose address is P.O. Box 776, Salinas, California. At the time of transaction involved herein respondent was licensed under the Act.

3. On or about October 27, 1981, complainant sold to respondent, 50 flats of pink cherry tomatoes at \$9.00 per flat plus .50 per flat for cooling, and \$5.00 for a Med-Fly certificate, for a total price of \$480.00, f.o.b.

4. On October 27, 1981 at 6:45 p.m., complainant shipped the tomatoes from loading point in California to respondent at Joplin, Missouri, by truck. The tomatoes arrived at destination in Joplin, Missouri on Friday evening, October 30. Respondent's customer unloaded the tomatoes and stored them in its cooler. On Monday morning, November 2, 1981, a federal inspection was called for, and at 1:40 p.m. of the same day the 50 flats of tomatoes were federally inspected and a certificate issued which stated in relevant part as follows:

<u>MARKET:</u>	Joplin, MO.
<u>RECEIVER:</u>	Harry's Food Service
<u>WHERE INSPECTED:</u>	1048 Wall Street
<u>Products Inspected:</u>	Cherry TOMATOES in 12-1 pint cardboard carton, "California Grown Tomatoes 12 Dry Pints Produce U.S.A., A.J. Trevino, 714 Millbrae, Salinas, CA 93901." Applicants count 50 flats.
<u>Condition of Load:</u>	Stacked at above location in cool room.
<u>Temperature of Product:</u>	Various pulp temperatures 50°F.
<u>Condition:</u>	Average 75% light red and red. From 8 to 30% average 18% soft and watery. From 2 to 12% average 8% Gray Mold Rot in various stages mostly advanced.
<u>Remarks:</u>	Applicant states above lot was part of a trailer shipment from California.

5. Respondent notified complainant of the results of the federal inspection on November 2, 1981.

6. An informal complaint was filed on December 30, 1981, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

Respondent claims that it rejected the lot of tomatoes. However, respondent unloaded the tomatoes from the truck when they arrived on Friday evening and consequently is deemed to have accepted the tomatoes at that time. See *Crown Orchard Co. v. Mid-Valley Produce Corporation*, 34 A.D. 1381 (1975). Since respondent accepted the tomatoes it became liable to complainant for the full purchase price thereof less any damages flowing from any breach of contract proven by respondent.

Respondent alleges that complainant breached the contract of sale by failing to ship tomatoes which were in suitable shipping condition. The regulation (7 CFR 46.43(i)) require that under f.o.b. terms of sale the produce be placed on board the transit facility at shipping point "in suitable shipping condition," and further provide that "the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." The regulations (7 CFR 46.43(j)) define suitable shipping condition as meaning "that the commodity, at time of billing, is a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." The time that the tomatoes were in transit, approximately 3 days, was normal. Complainant, however, alleges that the temperatures shown on the federal inspection taken on Monday, November 2, 1981, of 50°F. were not normal. Complainant states that since these tomatoes were pink it specified that the temperature on the truck was to be maintained between 34 and 36°F. Complainant further states "this can be confirmed by Veg-A-Mix's truck and delivery manifest, marked in report of investigation as exhibit I-B." However, as respondent points out, the printed blocks labeled 34° and 36° on exhibit I-B are not checked. Accordingly, we find that complainant has failed to show that it specified that such temperatures be maintained. Complainant's contention that such temperatures are the correct temperatures for the shipment of pink tomatoes is also without merit. Agriculture Handbook No. 105, *Protecting Perishable Foods During Transport by Motor Truck*, specifies desired transit temperatures of 45°F. to 50°F. for "Tomatoes (pink)." Accordingly we find that transportation services and conditions were normal as to the subject tomatoes.

Complainant also complains about the length of time between arrival of the tomatoes and the inspection of the tomatoes. However, the record indicates that the tomatoes arrived on the evening of Friday, October 30. Respondent states that it unloaded the tomatoes and held them in its cooler and secured a federal inspection at the earliest time possible on Monday, November 2. In view of the arrival time of the tomatoes we feel that we are fully warranted in looking at the Monday inspection for the purpose of determining, if possible, whether the tomatoes made good delivery at time of arrival on Friday. We note that the inspection shows gray mold rot averaging 8% in mostly advanced stages and an average of 18% soft and watery. The total average of these two condition factors is 26%. Under most circumstances we would allow an average of soft and/or decayed tomatoes of somewhere around 8% at time of arrival. We find that the federal inspection of November 2, 1981, shows that the tomatoes were not in suitable shipping condition when shipped.

The measure of damages for breach of warranty as to accepted goods is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted. See UCC §2-714(2). In the case of damaged goods, about the only way to establish their value is by prompt and proper resale. *Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 A.D. 1643 (1979). In this case respondent claims that the tomatoes were resold by Harry's Food Service and in respondent's sworn answer a recap of the results of the resale is given showing gross proceeds of \$90.00 and net returns, after a reduction of \$1.00 per flat for freight, of \$40.00. This is the amount which respondent remitted to complainant. However, although complainant complained several times about respondent's failure to place in evidence the actual accounting received from Harry's Food Service, respondent never submitted such an accounting. We think that complainant is entitled to the actual accounting from Harry's Food Service, and in view of respondent's failure to submit such an accounting we will not utilize respondent's hearsay recap of the accounting to compute damages in this case.

There is an alternative method by which we can compute damages in this case. The Uniform Commercial Code, section 2-714, provides for the recovery of ". . . the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." The official comments state that the measure of damages set forth in such section is not intended as an exclusive measure. The federal inspection revealed condition defects in the total amount of 26%. In the usual situation tomatoes could arrive with approximately 8% soft and/or decay and still be considered to have made good delivery. Accordingly, we will allow respondent as damages 18% (the difference between 26% and 8%) of the market value of conforming tomatoes at or about the time of arrival as shown by relevant market news service reports. There are no market news service reports for Joplin, Missouri, and accordingly we will use the market reports from St. Louis, Missouri. Such reports for January 4, 1981, (there were no reports for January 3) show that cherry tomatoes from California were selling for \$9.50 to \$10.00 per flat. Using the lower of these two figures, or \$9.50, the 50 flats of tomatoes, would have had a value of \$475.00. Eighteen percent of this amount is \$85.50, and we conclude that this is the amount which respondent should be awarded as herein.

As previously stated, when respondent accepted the subject cherry tomatoes, it became liable to complainant for the full contract price thereof or \$480.00. From this amount should be deducted respondent's damages of \$85.50 plus the amount which respondent has already paid complainant, or \$40.00. This leaves a net amount of \$354.50 for which

respondent remains liable to complainant. Respondent's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$354.50, with interest thereon at the rate of 13 percent per annum from December 1, 1981, until paid.

Copies of this order shall be served upon the parties.

(No. 22,933)

WILLIAM H. CLAPPS and TIMOTHY E. YAKSITCH d/b/a Myco v. DAN GARCIA BROKERAGE, INC. PACA Docket No. 2-6115. Decided October 13, 1983.

F.O.B. Sale—Transportation conditions—Good delivery standards—Suitable shipping condition.

Dennis Becker, Presiding Officer

Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$15,757.45 in connection with the sale of two truckloads of lettuce, one such truckload being in interstate commerce and the other being in foreign commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto, denying liability to the complainant. Although the amount claimed as damages in the formal complaint exceeded \$15,000.00 and the respondent originally asked for an oral hearing, the parties eventually agreed that the matter could be resolved by the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20). Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were

given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement, and respondent filed an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant is a partnership composed of William H. Clapp and Timothy Yaksitch, doing business as MYCO, with an address of P.O. Box 575 Lamont, California.

2. Respondent is a corporation, Dan Garcia Brokerage, Inc., with an address at Post Office Box 3129, Pinedale, California. At the time of the transactions involved in this proceeding respondent was licensed under the Act.

3. On April 8, 1982, complainant sold to respondent a truckload of lettuce consisting of 934 cartons of 24's Green Rose Lettuce, at \$8.00 per carton plus \$.65 per carton cooling and \$22.50 for a Ryan temperature thermometer for a total contract price of \$8,101.60 f.o.b. On or about April 8, 1982, the truckload of lettuce was loaded and shipped to respondent's customer in Philadelphia, Pennsylvania. Respondent's customer accepted the load of lettuce on its arrival.

4. On April 9, 1982, complainant sold to respondent a truckload consisting of 879 cartons of 24's of Green Rose Lettuce, at \$8.00 per carton plus \$.65 per carton cooling, \$30.00 for a shipping point inspection and \$22.50 for a Ryan temperature thermometer, for a total contract price of \$7,655.85, f.o.b. On or about April 9, 1982 the truckload of lettuce was loaded and shipped to respondent's customer in Montreal, Canada, where it arrived on or about April 15, 1982.

5. Upon arrival in Montreal, Canada the truckload of lettuce referred to in paragraph 4, above, was partially unloaded prior to being subjected to a Canadian inspection. The inspection showed in pertinent part as follows:

Temperature:

Product (Top) 7°C (45°F)

Product (Bottom) 9°C (48°F)

Vehicle 7°C (45°F)

Outside 8°C (46°F)

Warehouse 10°C (50°F)

Condition of Vehicle, Load, Pkgs, and Pack:

Clean, mechanical unit not operating. Most ctns unloaded when inspection started remainder piled 5 wide x 8 high, in good order. Properly packed.

Condition:

Wrapper leaves: Average 1% of heads showing slimy decay affecting 1 to 2 leaves.

Head leaves: Average 1% crushed midribs affecting more than 4 leaves.

Average 3% russet spotting affecting more than 4 leaves. Ranging from

nil to 42%, average 18% of heads showing slimy decay affecting from 1 to more than 4 mostly 3 leaves.

Certification:

Inspection requested for and certificate restricted to condition only.

6. With respect to the transaction set forth in paragraph 4, above, the bill of lading showed that the temperature in the truck for the lettuce was to be maintained between 34 and 36°F. The Ryan recorder showed that the temperature ranged between 39° and 45° during the trip.

7. A formal complaint was filed on July 7, 1982, which was within nine months of the time the causes of action herein arose.

DISCUSSION

This proceeding involves two entirely separate causes of action. Complainant merged them into a single complaint for purposes of convenience only. They will be dealt with seriatim.

With respect to the shipment of lettuce from California to Philadelphia, Pennsylvania on April 8, 1982, there is little if any issue as to whether respondent is liable. By its own admission, contained in its answering statement, to the extent that the lettuce was not U.S. No. 1 the fact that it took five days to transport it from California to Pennsylvania, and that the temperature maintained on the truck varied between 43° and 46°F when the bill of lading required that the shipment be maintained between 34° and 36°F indicate that there were abnormal transportation conditions. We are further constrained to find in favor of complainant because of the good delivery standards with respect to lettuce contained in 7 CFR 46.44. The invoice submitted by complainant reflected there was no grade for the lettuce. 7 CFR 46.44(a)(2) provides in pertinent part that:

If the contract does not specify a U.S. grade or percentage of condition defects, the lettuce at destination may contain a maximum of 15 percent, by count, of the heads in any lot which are damaged by condition defects, including therein not more than 9 percent serious damage of which not more than 5 percent may be decay affecting any portion of the head exclusive of wrapper leaves.

Respondent acknowledged in its answering statement that there was only 7% condition defects, including 6% decay on the head leaves, which is sufficiently close to the 5% limitation imposed by the regulations under the transportation and temperature conditions which respondent admits existed for us to conclude that had the transportation been normal and the temperatures been within the contract specifications the lettuce would have made good delivery.

It is not so simple to resolve whether the truckload of lettuce trans-

sale and purchase of lettuce during January 1982, there were in effect special conditions which modified the usual good delivery standards. Complainant avers that as a result of heavy frost in California in late 1981, which effectively diminished the quality and availability of lettuce in early 1982, it had established a practice under which it was selling lettuce with two conditions attached. One was that "weight no factor" would apply, which the parties to this proceeding agree means that the weight of the cartons of lettuce would be waived insofar as good delivery is concerned. The second condition was that "due to wide freeze damage good delivery applies to this sale except for blistering or peeling or rusty brown discoloration." Respondent avers with respect to the two transactions in issue in this proceeding that the two special conditions established by complainant were not in effect. The determination as to who must prevail in this proceeding turns as regards the first transaction on whether the condition with respect to blistering, peeling and rusty brown discoloration was established for the transaction, and with respect to the second transaction with whether weight was or was not a factor. Based on our review of the entire record available in this proceeding we have concluded that complainant must prevail with respect to both transactions. The evidence shows that prior to January 16, 1982 and January 18, 1982, the dates of the transactions involved herein, complainant had issued to respondent at various locations, including the receiving point involved in this proceeding, St. Louis, Missouri, invoices which contained the two statements in issue here. Thus, as will be discussed more fully below, respondent was on notice prior to the date of these proceedings that complaint was selling subject to the two above-mentioned conditions.

An invoice issued by a seller is generally the best evidence of the terms and conditions of a purchase and sale contract. However, the terms may be shown to be otherwise by other relevant evidence. Respondent endeavored to do so in this proceeding by stating that it was not until it received the invoices that it first learned that complainant was asserting the two conditions involved in this proceeding. It did so by means of affidavits by Bruce Rubin, located in St. Louis, Missouri, Patrick J. Small, located in Springfield, Illinois, and Phil Gumpert and Rick Harsnett, located in Indianapolis, Indiana, all of whom were employees of respondent. They each stated that they had dealt with complainant during January 1982, and that they were not aware until after January 21, 1982 that complainant was selling lettuce subject to the conditions of "weight no factor" and "due to wide freeze damage good delivery applies to this sale except for blistering or peeling or rusty brown discoloration." The affidavits of Mr. Small, and Mr. Gumpert and Mr. Harsnett, are largely irrelevant to this proceeding because the

statements contained therein relate to transactions other than those with which we are here concerned. It is difficult to interpolate from other transactions in other locations involving complainant and other divisions of respondent what was happening in St. Louis, Missouri. The affidavit of Mr. Rubin has more relevance. However, we are constrained to ignore those portions of the affidavit relating to purchases of lettuce from sellers other than complainant because they do not reach the issue as to the nature of the transactions with complainant. In paragraph 7 of his affidavit Mr. Rubin states that on January 4, 1982, he purchased 960 cartons of lettuce from complainant warranted by John Millard of complainant as having "carton weight of lettuce of 43-45 lbs. before cooling; good delivery standards apply excluding bruising and/or discoloration following bruising." With respect to a transaction on January 11, 1982, involving complainant and respondent Mr. Rubin stated that the same representations were made. The same was true with respect to a transaction on January 14, 1982. There were attached to the affidavit "Purchase and Sale and Order" forms of respondent which showed its understanding of the conditions of the transactions. However, nowhere did respondent provide the invoices of complainant. Respondent's stated understandings were that "good delivery standards apply excluding bruising and/or discoloration following bruising."

Complainant, however, did provide the invoices pertaining not only to the transactions involved in this proceeding, but also to the transaction between it and respondent which occurred on January 4, 1982, and certain other transactions. They were attached to its Statement in Reply, which also included the affidavit of Mr. John Millard, its Sales Manager who dealt with respondent. They showed that as early as December 18, 1981, in a transaction involving complainant and respondent with the receiving point being St. Louis, Missouri, a condition was that "weight no factor" applied. At that time the freezing condition was not applicable. By January 2, 1982, while not a dispositive fact, with respect to a shipment made by complainant to respondent in Springfield, Illinois, both the weight condition and the freezing condition were set forth on the invoice. The record further shows that no complaint was made with respect to this matter by respondent, and that it paid the full face amount of the invoice in a check dated January 22, 1982. The most telling invoice is the one dated January 4, 1982 in which there was a sale of lettuce to respondent in St. Louis, Missouri. Both conditions were stamped on the invoice. Evidently, respondent finally noted the conditions because it sent the invoice back to complainant with the statement "please send corrected bill" and the date "1-20-82" written on the copy. Therefore, we conclude that respondent knew prior to January 20, 1982, probably at least as early as about January 10 or 12,

1982, or was charged with this knowledge, that complainant was placing those conditions on its sales of lettuce. Its failure to complain promptly as regards the terms, and not to do so until the first load in issue in this proceeding had been received and inspected leads us to conclude that the invoices properly reflected the terms of the contracts. A failure promptly to complain as to the terms set forth in an invoice is considered strong evidence that they were correctly stated. *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311, 317 (1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218, 224-225 (1960).

In an invoice involving a shipment to Indianapolis, Indiana, on January 16, 1982, which invoice was received by Tom Lange Company on January 22, 1982, the two conditions were stamped thereon. As set forth in the affidavit of Mr. Gumpert and Mr. Harsnett in Indianapolis they learned on January 21, 1982 from Mr. Rubin that the conditions were being enforced. They returned the invoice to complainant with a notation "did not agree to these terms." However, having received the invoice after the conversation with Mr. Rubin, we conclude that the reason their statement as regards the terms was put on the invoice by respondent was as a result of the discussion with Mr. Rubin rather than the actual contract negotiations. Invoices sent by complainant to respondent during this period of time to other locations in the midwest were similarly stamped. In fact, as late as January 26, 1982, other locations in which respondent was operating were accepting the two conditions involved. In view of all of the above factors we conclude that complainant had properly notified respondent of the conditions involving weight and freezing, and that they were a part of the contract with respect to both transactions in this proceeding.

As regards the transaction which occurred on January 16, 1982, the inspection certificate stated as to grade that the shipment "fails to grade U.S. No. 1 account of grade defects." Respondent rejected it on the grounds it failed to make good delivery because of freeze damage, presumably because of the condition defects. Since the inspection was a restricted inspection which covered less than one half of the load of lettuce, the inspection certificate is not valid as to the entire load. On this basis alone, we must find that the load of lettuce made good delivery. See *Macio Saikhon v. Russel-Ward Company, Inc.*, 34 Agric. Dec. 1940 (1975); *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359, 1363 (1979). In any event, the kinds of conditions giving rise to the rejection of the lettuce by respondent because of condition defects were basically those which were precluded from assurances of good delivery by complainant, namely the discoloration of the leaves. There was also an average of 4% damage by Tip burn and 2% damage by decay, which was well within the good delivery standards for lettuce. (7 CFR 46.44(b)) Therefore, respondent wrongfully rejected

the lettuce involved in the January 16, 1982, transaction, as a result of which complainant is entitled to damages. Complainant, sold the lettuce to La Mantia Brothers Arrigo Company in Chicago, Illinois, and netted after deduction of freight \$2,208.00. Therefore, complainant suffered damages in the amount of \$9,936.00. Respondent's failure to pay this amount of money is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

With respect to the second transaction, occurring on January 18, 1982, the inspection certificate shows that this was also a restricted inspection, limited to "all layers of last three stacks nearest rear door of trailer." For the same reasons as discussed above, because this is less than 50 percent of the entire load of 850 cartons of lettuce the inspection certificate is not valid as to the entire load. In any event, since weight was no factor with respect to this load of lettuce, weighing from 35½ to 40½ pounds, average 36.20 pounds per carton, and being rejected by respondent because of short weight, respondent wrongfully rejected the load of lettuce, thereby making it liable for damages to complainant. Complainant resold the lettuce to Joseph & Rayhill Produce, Inc., in Louisville, Kentucky for \$9,997.00. Deducting this from the full f.o.b. contract price of \$18,302.50, we find that complainant suffered damages in the amount of \$8,305.50. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant as reparation \$13,241.50, with interest thereon at the rate of 13 per cent per annum from February 1, 1982, until paid.

The counterclaim in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,936)

TOP PAC GROWERS & SHIPPERS, INC. v. FERWERDA'S WHOLESALE PRODUCE CO., INC PACA Docket No. 2-6155. Decided October 13, 1983.

Acceptance—Accord and satisfaction.

Edward M. Silverstein, Presiding Officer.

Thomas R. Oliver, Newport Beach, California, for complainant.

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,804.00, in connection with one transaction, in interstate commerce, involving tomatoes, a perishable agricultural commodity.

A copy of the Department's report of investigation was served upon both parties. Respondent also was served with a copy of the complaint, and filed an answer thereto denying any liability to complainant. In addition, respondent filed a counterclaim, in an unstated amount, in connection with the same shipment of tomatoes.

Since the amount claimed as damages did not exceed \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements. Complainant filed a verified opening statement, and respondent filed a verified answering statement. Both parties also filed briefs.

FINDINGS OF FACT

1. Complainant, Top Pac Growers & Shippers, Inc., is a corporation whose mailing address is P.O. Box 1001, Tracy, California 95376.
2. Respondent, Ferwerda's Wholesale Produce Co., Inc., is a corporation whose mailing address is Pompano Terminal Building, Office No. 61, 1202 Hammondville Road, Pompano Beach, Florida 33060.
3. Both complainant and respondent, at the time of the transaction involved herein, were licensed under the PACA.
4. On or about October 27, 1981, in the course of interstate commerce, complainant by oral contract, sold to respondent 1280 cartons of tomatoes, a perishable agricultural commodity, as indicated below:

Lot	Cartons	Grade	Commodity	Size	Unit Price	Total
25	359	2	M/G Tomatoes	Med	3.00	1,077.00
26	537	2	M/G Tomatoes	Med	3.00	1,611.00
26	384	1	M/G Tomatoes	Med	4.00	<u>1,636.00</u>
	1280					4,224.00
			Thermagard #122531			22.50
1152			Palletized		.15	<u>172.80</u>
						4,419.30

5. On or about October 27, 1981 respondent shipped from a loading point in the State of California to respondent in Pompano Beach, Florida, the shipment of tomatoes as indicated in paragraph 4, above. On Sunday, November 1, 1981, the truckload of tomatoes arrived at respondent's location at about 10:00 a.m. A preliminary inspection by respondent's agents indicated that there was some damage to the tomatoes, and the respondent conveyed this information directly to the broker involved in the transaction, Dock Case of the Dock Case Brokerage Company, 912 North Town and River Drive, Fort Myers, Florida 33907. Mr. Case submitted a statement to the Department in which he stated the following as to the transaction at issue here:

On the day the tomatoes arrived at Ferwerda's place of business, I received a telephone call from Bruce Puls who works for Ferwerda. He told me that they had rejected the load because there was a lot of trouble with the load.

I then immediately called John Rogers of Top Pac to advise him that there were problems with the load. John Rogers told me that Ferwerda should get an inspection, and Top Pac would work it out as to the problem tomatoes.

I then called Bruce Puls and told him what John Rogers had said to me—that they should accept the tomatoes because Top Pac would protect them against any loss.

It was my understanding that Top Pac had agreed to protect for problem tomatoes regardless of whether the tomatoes made grade or not, and that Ferwerda's would be liable only for saleable tomatoes.

5. On November 2, 1981, at 2:00 p.m., the tomatoes were inspected at respondent's location with the following results in pertinent part:

Products Inspected:

TOMATOES in separate cartons printed 'Earls Pearls brand,' or 'Mac's Babies' Brand; Top Pac Growers and Shippers, 306 W 6th, P.O. Box 1001, Tracy, Ca., 95376 and stamped to denote size (Med. size noted), also stamped 'Fed-State Lot 810'. Applicant states 384 Earls Pearls Brand 896 Mac's Babies Brand. TOTAL 1,280 cartons.

Condition of Load:

Stacked at above location on pallets

Condition of Pack:

Well filled.

Temperature of Product:

Various cartons 69°F.

Condition:

Earls Pearls Lot: Averages approximately 95% green and breakers, 5% turning and pink. From 2% to 4% in most samples, in many none, averages 2% Gray Mold Rot generally in advanced stages. From 4% to 10%, averages 7% damage by sunken

discolored areas occurring generally over shoulders, *Mac's Babies Lot*. Averages approximately 85% green and breakers, 10% turning and pink. In most samples 2% to 8%, in some none, averages 3% Gray Mold Rot mostly in advanced, some in early stages. From 16% to 36%, averages 24% damage by sunken discolored areas occurring over shoulders and sides of Tomatoes.

6. On or about November 21, 1981 the respondent mailed complainant a check in the amount of \$2,115.30. Along with the check was a detailed statement in which it showed how it derived at this figure. Essentially, respondent took a credit of \$1.10 per box on the Earls Pearls Brand tomatoes, and a \$2.10 credit per box on the Mac's Babies brand tomatoes. On December 1, 1981, complainant returned respondent's check to it indicating that this payment was not acceptable and demanding full payment for the load of tomatoes. Respondent resubmitted the same check to complainant on or about December 21, 1981, noting the following:

THIS LOAD ARRIVED SUNDAY NOV. 1 USDA INSPECTION MONDAY NOV. 2, COPY ATTACHED-OUR BROKER DOC CASE ASSURES US HE REPORTED THIS TO YOU AT ONCE. AN ADDITIONAL CHARGE FOR SORTING & GRADING WAS NOT DEDUCTED AT .60 PER BX 1280 BOXES PLEASE CONTACK [sic] DOCK [sic] CASE FOR VERIFICATION a2

On or about December 23, 1981, the complainant negotiated the check.

7. The formal complaint was filed herein on August 19, 1982, which was within nine months of when the cause of action stated here accrued.

CONCLUSIONS

The parties have opposite views as to whether or not this load of tomatoes was accepted. However, if it was rejected, as contended by respondent, because of alleged condition defects, the rejection was improper because the tomatoes in this shipment did make the grade required by the contract. See 7 CFR §51.1861(a) and (c). However, we conclude that, since it unloaded the tomatoes, respondent accepted them. *R. Huston v. S. Waldron*, 32 Agric. Dec. 1592 (1973). Having accepted the tomatoes, respondent was liable for the full contract price less any provable damages resulting from a breach of contract committed by complainant. *Mutual Vegetable Sales v. Sales Select Distributors*, 38 Agric. Dec. 1359 (1979). Such a conclusion is consistent with the broker's statement contained in Finding of Fact No. 5, above. Since respondent has failed to submit any evidence as to dam-

age, we must conclude that it was responsible for the full contract price, or \$4,419.30.

As further defense, respondent alleges that its November 21, 1981, check in the amount of \$2,115.30 was accepted by complainant in full accord and satisfaction for this shipment of tomatoes. This check was first submitted to the complainant in November. However, complainant promptly returned it to respondent, and demanded full payment. In December, the respondent resubmitted the check to complainant asserting, in effect, that it was all complainant was entitled to receive. See Finding of Fact No. 6, above.

To constitute an accord and satisfaction, it is necessary that the payment be offered in full satisfaction of the outstanding debt, and that it be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction of the debt. Also, it must be such that the party to whom it is offered is bound to understand that, if he takes it, he takes it subject to such conditions. The fact that a creditor receives a check in less than the amount of the invoice, with the knowledge that the buyer claims to be indebted to him only to the extent of the payment made, does not necessarily establish and accord and satisfaction. *Half Moon Fruit & Produce Co. v. North American Produce*, 40 Agric. Dec. 1610 (1981). However, the creditor's assent need not necessarily be expressed. See, WILLISTON ON CONTRACTS, THIRD EDITION, SECTIONS 1855-1856. According to Williston, "It becomes a question of fact what the bargain was to which they assented."

In the instant case, we believe that there was an accord and satisfaction. Our belief is founded upon the fact that the respondent not only submitted the check to complainant once but, after the complainant sent it back and demanded full payment, the respondent resent the same check to the complainant. Inasmuch as the respondent in resubmitting the check to it informed the complainant that the amount in the check was all the latter was entitled to for the transaction, and complainant negotiated it, we believe complainant manifested an intent to assent to an accord and satisfaction. We must point out, however, that our conclusion that there was an accord and satisfaction might be different had the check been cashed by the complainant the first time respondent sent it. At that point in time, it is not clear to us that the respondent had manifested an intent that complainant's acceptance of the check would be in full accord and satisfaction. However, such manifestation became clear when it resubmitted the same check to the complainant.

Inasmuch as there was an accord and satisfaction, the complaint should be and is dismissed.

In view of the above, the counterclaim is also dismissed.

ORDER

The complaint is dismissed.
The counterclaim is dismissed.
Copies of this order shall be served upon the parties.

(No. 22,937)

THE AUSTER COMPANY, INC. v. MORRIS GOLDMAN, INC. PACA Docket No. 2-6166. Decided October 13, 1983.

Novation of original contract.

*Edward M. Silverstein, Presiding Officer,
Complainant and Respondent, pro se.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$5,616.00 in connection with one transaction, in interstate commerce, involving cherries, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages does not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements. Complainant filed an opening statement, respondent an answering statement, and complainant a statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, The Auster Company, Inc., is a corporation whose mailing address is 51 South Water Market, Chicago, Illinois 60608.

2. Respondent, Morris Goldman, Inc., is a corporation whose mailing address is 340 North Broadway, Milwaukee, Wisconsin 53202. At all material times, respondent was licensed under the Act.

3. On or about June 15, 1982, in the course of interstate commerce, complainant by oral contract, sold to respondent 156 lugs of cherries, a perishable agricultural commodity, at an agreed price of \$24.00 per lug f.o.b. Chicago. On or about that date, the complainant shipped 234 lugs of cherries to respondent in Milwaukee, Wisconsin, in a truck operated by C&M Cartage. When the truck arrived in Milwaukee, the respondent's place of business was closed. The trucking company placed the cherries in a cooler which was near the respondent's business location, and which was owned by another produce company named I. Gagliano. The cherries remained in that cooler until the following morning.

4. On June 16, 1982, the respondent inspected the 234 lugs of cherries, and found that many of the cartons contained moldy and decayed cherries. At 8:24 a.m. on that morning, the respondent telephoned complainant, and informed complainant that it was rejecting the cherries because of their condition. The parties then negotiated a new contract whereby respondent would handle the cherries for complainant's account.

5. On or about July 17, 1982, the respondent submitted an account of sales to complainant for the 234 cartons of cherries as follows:

ACCOUNT SALES-234 CHERRIES

14 Carton Cherries	@\$28.00	\$392.00
16	@27.00	432.00
8	@26.50	212.00
10	@26.00	260.00
12	@25.00	300.00
27	@24.00	648.00
1	@23.00	23.00
6	@22.00	132.00
28	@20.00	560.00
8	@18.00	144.00
11	@17.00	187.00
7	@15.00	105.00
1	@14.00	14.00
9	@10.00	90.00
1	@ 3.00	3.00
<u>159 Sold</u>		<u>\$3,502.00</u>
<u>75 Dumped</u>		
<u>234</u>		
Less: Chicago cartage-234 cartons @ \$.50		117.00
Commission-10%		<u>350.20</u>
		467.20
Amount remitted		\$3,034.80

Along with the account of sales, the respondent submitted a check in the amount of \$3,034.80 to complainant. Complainant refused to accept the check, and returned it to respondent.

6. The formal Complaint was filed on September 21, 1982, which was within nine months of when the cause of action herein accrued.

CONCLUSIONS

The dispositive issue in this case is whether or not the parties agreed to a novation of the original contract, and to substitute therefor an agreement for the respondent to handle the 234 cartons of cherries for complainant's account. We are convinced by a preponderance of the evidence that there was such an agreement. Our conclusion is based upon the fact that the respondent's telephone records support its statements as to the circumstances involved in this matter, and dispute complainant's statements. For example, the complainant alleges that the respondent telephoned it twice on June 15, and that the respondent did not complain about the cherries until June 18. However, the respondent's telephone records indicate that it spoke to complainant only once on June 15, and once on the morning of June 16, 1982, and not at all on June 18, 1982. This is consistent with respondent's statement that it ordered the cherries on the 15th, and rejected the shipment on the 16th. We hold, therefore, that the parties agreed that the respondent should handle the cherries for complainant's account. On the basis of all of the evidence in the case, we conclude that respondent should be liable to complainant only in the amount of \$3,034.80 as supported by its account of sales submitted to complainant in July 1982.

Since respondent tendered the amount due to complainant, it cannot be said that it has violated the Act. Nevertheless, \$3,034.80 remains due complainant from respondent. This proceeding should be held open for a period of 30 days in order to give the parties an opportunity for settlement on the basis of \$3,034.80. At the expiration of 30 days, or upon receipt of notice that some definite action has been taken, an appropriate order should be issued. *Salinas Marketing Cooperative v. Leonard O'Day Co.*, 16 Agric. Dec. 719 (1957).

ORDER

The proceeding is hereby continued for the purposes of allowing respondent to pay complainant \$3,034.80.

Copies of this order shall be served upon the parties.

(No. 22,938)

JAMES P. BONIFACINO MUSHROOMS v. C & G MUSHROOM CO., OF FLORIDA. PACA Docket No. 2-6173. Decided October 13, 1983.

Complaint dismissed, complainant failed to show any amount remaining due.

George S. Whitten, Presiding Officer
Complainant and Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$49,433.75 in connection with the sale to respondent of numerous loads of mushrooms in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting liability to complainant in the amount of \$34,232.15 and denying liability for the balance. On January 19, 1983, an order was issued requiring respondent to pay to complainant \$34,232.15 as an undisputed amount. Respondent's liability for payment of the remaining disputed amount of \$15,201.60 was left for subsequent determination.

Although the amount claimed as damages in the formal complaint exceeds \$15,000.00, oral hearing was waived by the parties. Accordingly, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case as is the Department's report of investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Respondent filed an answering statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, James P. Bonifacino, is an individual doing business as James P. Bonifacino Mushrooms, whose address is New Garden Road, Toughkenamon, Pennsylvania.

2. Respondent, C & G Mushroom Co. of Florida, is a corporation whose address is 4801 Pembroke Road, Hollywood, Florida. At the time of the transactions involved herein respondent was licensed under the Act.

3. Between April 12, and June 30, 1982, complainant sold and shipped to respondent 32 loads of mushrooms having a total invoice price of \$51,757.65. Prior to April 12, 1982, complainant sold and shipped to respondent additional quantities of mushrooms in an undetermined amount for undetermined prices.

4. During the period from March 11, 1982, through January 27, 1983, respondent paid complainant in excess of \$161,000.00 for mushrooms.

5. The formal complaint was filed on October 7, 1982, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

The record herein reflects a running account between the parties in which the last sale occurred on June 30, 1982. Accordingly, we have jurisdiction over the transactions involved in such running account. See *Jolivette Produce v. J. J. Distributing*, 41 Agric. Dec 141 (1982).

Complainant alleges in the formal complaint that it sold numerous truckloads of mushrooms to respondent beginning with the 26th day of October, 1981. However, complainant attached invoices to the formal complaint covering sales of mushrooms from April 12, 1982, through June 30, 1982. Excluding one invoice (#3612) as to which the dollar amount is blank, the invoices attached by complainant to the formal complaint total \$51,757.65. The report of investigation includes ledger sheets compiled by complainant in which the earliest sales appear (portions of the ledger sheets are illegible) to have begun on January 25, 1982. At this point in time the ledger sheet shows that there was a balance due from respondent of \$4,601.45. The ledger sheets show payments from respondent totalling over \$148,000.00, and a balance at the end of the period covered by the ledger sheets (June 30, 1982) of \$52,452.50 owing from respondent to complainant.

Respondent attached to its answer its own ledger sheet showing payments through September 6, 1982, and disclosing four (4) payments not shown on complainant's ledger sheet, which four payments total \$7,365.85. One of these payments, in the amount of \$4,288.50, is shown as having been made on June 8, 1982, which presumably would of been within the time included on complainant's ledger sheet. Complainant made no reply to the allegations of additional payments on the part of respondent. Respondent also filed an answering statement which set forth payments from December 24, 1981, through January 27, 1983, in the total amounts

of \$245,044.20. Attached to the answering statement were copies of cancelled checks or wire transfers documenting that these payments have been made. Only \$35,947.85 of the documented amounts shown in respondent's answering statement were for payments made prior to or after the period covered by complainant's balance sheets. This means that respondent has documented well over \$60,000.00 in payments made to complainant during the period shown by complainant's balance sheets which were not credited to respondent on such balance sheets. This apparent failure by complainant is made clearer when we consider that although the balance sheets began on January 25, 1982, the first payment shown by complainant on such balance sheet is on March 11, 1982, in the amount of \$10,000.00, and respondent has shown payments made to complainant by checks dated from January 30, through March 8, 1982, in a total amount of \$62,000.00. Apparently, respondent was not credited with many of these payments.¹ Complainant made no reply to respondent's answering statement. On the basis of all of the evidence of record we find that complainant has failed to show that any amount is remaining due from respondent to complainant. The complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,939)

BUD ANTLE, INC. v. GILARDI TRUCK & TRANSPORTATION, INC., a/t/a A. M. GILARDI & SONS. PACA Docket No. 2-6203. Decided October 13, 1983.

Failure to pay.

Edward M. Silverstein, Presiding Officer.

Complainant, *pro se*.

Gary E. Susser, Dayton, Ohio, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

¹We say "apparently" due to the fact that the payment entries on complainant's balance sheets show only an amount and a date, and because most of the payments are in rounded off \$1,000 increments, many being for the same amount. Due to this fact, and due to complainant's failure to identify respondent's payments by reference to check number or other identifying factors, we cannot match respondent's checks with complainant's payment entries with any certainty.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$3,819.45, in connection with two transactions involving the sale of mixed perishable commodities which moved in interstate commerce.

A copy of the Department's report of investigation was served upon each of the parties. Also, a copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

Inasmuch as the amount claimed as damages herein does not exceed \$15,000, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the verified pleadings of the parties and Department's report of investigation are considered a part of the evidence in the case. In addition, the parties were given the opportunity to file further evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Bud Antle Inc., is a corporation whose mailing address is P.O. Box 1759, Salinas, California 93902.
2. Respondent, Gilardi Truck & Transportation, Inc., a/t/a A. M. Gilardi & Sons, is a corporation whose mailing address is 2355 Wapak Road, Sidney, Ohio 45365. At all material times, respondent was licensed under the Act.
3. On or about May 8, 1982 and May 26, 1982, complainant sold and shipped to respondent two partial truckloads of mixed vegetables, all being perishable agricultural commodities. The total price of the produce on the two shipments was \$3,819.45. Respondent received and accepted the same, however it has not paid respondent any of the agreed purchase prices.
4. The formal complaint was filed on December 6, 1982, which was within nine months after the cause of action stated herein accrued.

CONCLUSIONS

Complainant, in its verified complaint, set forth the basic allegations of the sale and shipment of mixed vegetables to respondent on the dates of May 8, and May 26, 1982. Complainant also attached to the sworn

complaint, documentation in the form of invoices showing the sale of such produce to respondent. Complainant alleges in the sworn complaint that all of the produce was received by respondent at respondent's place of business and accepted by it. The only response filed at any time in this proceeding by respondent is the sworn answer to the complaint in which it merely stated a general denial to the substantive allegations of the complaint.

We conclude on the basis of all of the evidence of record that complainant has adequately proven that the subject produce was sold and delivered to respondent, and that respondent has failed to pay the agreed contract prices thereof, or \$3,819.45. Respondent's failure to pay such amount to complainant is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation \$3,819.45, with interest thereon at the rate of 13% per annum from June 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,940)

CARL DOBLER & SONS v. CORGAN & SON, INC. PACA Docket No. 2-6142. Decided October 24, 1983.

Price adjustment.

George S. Whitten, Presiding officer.

Thomas P. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of \$2,144.00 in connection with the shipment in interstate commerce of two truckloads of lettuce.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served

upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed \$16,000.00, and the shortened method of procedure provided in 47.20 of the Rules of Practice (7 CFR 47.20) is, therefore, applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement and respondent filed an answering statement. Complainant also filed a brief.

FINDINGS OF FACT

1. Complainant, Carl Dobler & Sons, is a partnership composed of Carl F. Dobler and Ken W. Dobler, whose address is 174 Sturve Road, Watsonville, California.

2. Respondent, Corgan & Son, Inc., is a corporation whose address is 168-166 New York City Terminal Market, Bronx, New York. At the time of the transactions involved herein respondent was licensed under the Act.

3. On or about October 13, 1981, complainant sold and shipped to respondent one truckload of lettuce containing 848 cartons at \$4.00 per carton, plus \$22.50 for a Ryan temperature recorder and \$.65 per carton for cooling, for a total invoice price of \$3,965.70, f.o.b.

4. On or about October 15, 1981, complainant sold and shipped to respondent one truckload of lettuce containing 864 cartons at \$4.50 per carton, plus \$22.50 for a Ryan temperature recorder, and \$.65 per carton for cooling, for a total invoice price of \$4,472.10, f.o.b.

5. The lettuce covered by finding 3 arrived at respondent's place of business in New York on October 19, 1981, and 200 cartons of such lettuce were subjected to federal inspection at 8:50 a.m. while being unloaded from the truck. Such inspection showed an average of 4% decay in the wrapper leaves, an average of 4% damage by discoloration following bruising scattered throughout pack in the head leaves, and an average of 9% Bacterial Soft Rot in various stages in the head leaves.

6. The lettuce covered by finding 4 arrived at respondent's place of business on October 22, 1981, and 60 cartons of such lettuce were subjected to federal inspection at 11:00 a.m. while being unloaded from the truck. Such inspection showed an average of 3% decay in the wrapper leaves, and an average of 8% Bacterial Soft Rot in various stages in the head leaves.

7. On November 4, 1981, complainant and respondent agreed to an adjustment in price for the lettuce in both loads to \$1.50 per carton plus cooling Ryan recorders. Respondent has paid complainant this amount.

8. The contracts of sale and the adjustments were negotiated through a broker, Richard Kaiser Co., Inc. of Salinas, California.

9. The informal complaint was filed on June 15, 1982, which was within nine months after the causes of action alleged herein accrued.

CONCLUSIONS

Complainant alleges that after arrival of the lettuce at respondent's place of business it agreed to an adjustment in price which lowered the price of the cartons of lettuce by \$1.50 per carton. Respondent contends that the price of the lettuce was adjusted to \$1.50 per carton. The broker who negotiated both the sale of the lettuce and the price adjustment issued a "CONFIRMATION - CHANGE OF ORDER" form as to each load of lettuce. These two forms were attached as exhibits to the report of investigation as well as to other documents which were made a part of the record herein. The form covering the October 13, 1981, shipment shows in relevant part as follows:

Invoice price 848 - LETTUCE at \$4.00

Adjusted Price 848 - LETTUCE at \$1.50

The form covering the October 15 shipment shows in relevant part as follows:

Invoice price 864 - LETTUCE at \$4.50

Adjusted Price 864 - LETTUCE at \$1.50

Although complainant characterized both of these forms as showing a reduction in the amount of \$1.50 per carton it is obvious that the forms instead show that the adjusted price was \$1.50 per carton. These forms were issued on November 4, 1981 and on November 5, 1981. Respondent issued checks to complainant paying for the lettuce on each load in accordance with the new \$1.50 per carton price. Nowhere in the record does complainant claim that either the forms issued by the broker or the checks issued by respondent were received late by complainant. In addition there is no indication in the record that there was any objection by complainant to either the forms or the checks. The first indication in the record that might be construed as such an objection is the informal complaint filed by complainant's representative on June 21, 1982, with the Department.

In response to the Department's inquiry the broker wrote to the Department on July 9, 1982, and made the following comments relative to the adjustment on the two loads:

The two loads were purchased under good delivery standards FOB at \$4.50 and \$4.00 plus cooling respectively. Each arrived sixth morning, were inspected, found to be in breach of contract and duly reported. Upon completion of sale of these loads, Corgan reported the returns to us and we negotiated a settlement price of \$1.50 FOB plus cooling on both loads. We accomplished this at 2:00 PM on November 4, 1981. These facts are clearly shown on our "Confirmation - Change of Order" form. (Please see enclosed copy.)

Your letter infers that our confirmation is a cause of confusion. In paragraph four (4) you quote or Confirmation as saying "864 Lettuce @\$1.50". This is untrue. You will please note that our form reads: "Invoice Price: @\$4.00

Adjusted Price @\$1.50". The word "Price" is clearly and permanently printed on our forms.

In closing we would like to state how shocked we were at these files being disputed. We had considered them long since settled and closed. We can not understand the nearly seven (7) month gulf of time between the settlement date and this complaint.

We conclude that the record establishes that there was an adjustment in price as to each load of lettuce to \$1.50 per carton plus cooling and Ryan recorder. This amount has been paid by respondent to complainant. Accordingly, the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,941)

NALBANDIAN FARMS, INC. v. POST & TABACK, INC. PACA Docket No. 2-6161. Decided October 24, 1983.

Contract term—Price adjustment.

George S. Whitten, Presiding Officer.

Matthew M. McInerney, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$7,529 in connection with a transaction in interstate commerce involving the purchase of a truckload of lettuce.

Copies of the report of investigation prepared by the Department were served upon the parties. A copy of a formal complaint was served upon respondent which filed an answer thereto denying liability to complainant.

The amount claimed herein does not exceed \$15,000, and therefore, the shortened method of procedure provided in 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to this procedure the verified pleadings of the parties are considered a part of the evidence as is the Department's report of investigation. The parties were given the opportunity to file additional evidence in the form of verified statements. Complainant filed an opening statement and respondent file an answering statement. Complainant did not file a statement in reply. Complainant filed a brief.

FINDINGS OF FACT

1. Complainant, Nalbandian Farms, Inc., is a corporation whose address is P.O. Box 845, Glendale, Arizona.
2. Respondent, Post & Taback, Inc., is a corporation whose address is 253-256 New York City Terminal Market, Bronx, New York. At the time of the transaction involved herein respondent was licensed under the Act.
3. On or about March 31, 1982, complainant sold to respondent 840 cartons of lettuce consisting of 809 cartons of size 30 at \$13.00 per carton and 31 cartons of size 24 at \$15.00 per carton, plus .70 per carton for cooling, and \$22.50 for a Ryan temperature recorder, or a total price of \$11,592.50, f.o.b.
4. Complainant shipped the lettuce to respondent by truck on March 31, 1982. The lettuce arrived at respondent's place of business on or before April 7, 1982. On April 7, 1982, at 8:30 a.m., the lettuce was federally inspected at respondent's place of business with the following results in relevant part:

TRAILER LIC:	MAR 5584
KIND:	Refr. Mech
WHERE INSPECTED:	Hunts Point Mkt. Applicant's Store.

<u>Condition of Equipment:</u>	Temperature controls in operation.
<u>Products Inspected:</u>	LETTUCE, Iceburg type in cartons branded "Nalbandian Desert Lettuce produce of USA 2 ½ doz heads grown packed and shipped Nalbandian Farms Inc Glendale, Ariz Applicant states 809 cartons.
<u>Condition of Load.</u>	Through 7 rows 6 layers. Lengthwise Crosswise load.
<u>Condition of Pack:</u> <u>TEMPERATURE OF PRODUCT:</u> <u>CONDITION:</u>	Tight in layers. Ranges 38 to 39F. Heads or portions of heads not affected by condition defects are fresh and crisp. Wrapper Leaves No decay. Head leaves: Average no. 3% damage by rib discoloration. No. 2 to 3 heads per carton, average no. 8% damaged by tipburn. 1 to 4 decay heads in most cartons, none in some average 8% Bacterial Soft Rot in various stages affecting from 1 to 2 leaves.
<u>Remarks:</u>	Inspection and certificate restricted to product and lading to 50 cartons being unloaded, 2 incomplete stacks and upper 2 layers of 3 stacks nearest rear doors.

5. The transaction between complainant and respondent was negotiated through a broker, Misty Mountain Trading Co., of Oxnard, California. After the inspection of the lettuce on April 7, 1982, respondent's Vice President, Allen Taback, called Sue Howerton of Misty Mountain Trading Co. and complained that the lettuce failed to meet the requirements of the contract. Sue Howerton then called John Fraley, the salesmen for complainant who negotiated the contract, and reported to him at 9:30 a.m. on April 7, the results of the federal inspection, and respondent's complaint. John Fraley authorized respondent's handling of the lettuce on a "price after sale bases". Following the sale of the lettuce John Fraley and Allen Taback conferred through the broker and also directly with each other and agreed on a price of \$4.00 per carton for the size 30 lettuce and \$7.00 per carton for the size 24 lettuce.

6. The formal complaint was filed on August 31, 1982, which was within nine months after the cause of action herein accrued.

CONCLUSIONS

The pivotal factual issues in this proceeding concern whether there was an agreement between the parties made subsequent to the arrival of the lettuce which changed to the terms of sale to price after arrival, and whether pursuant to this change in the terms of sale the parties proceeded to agree on a new price subsequent to the resale of the lettuce.

The evidence submitted by the parties is in direct conflict on these factual issues.

Respondent submitted affidavits from its Vice President, Mr. Taback, and from Sue Howerton of Misty Mountain Trading Co., both of whom were involved directly in the negotiations subsequent to the arrival of the lettuce. Mr. Taback and Mrs. Howerton both stated in their sworn statements that Mr. Fraley agreed to the change in contract terms to "price after sale." They also stated that Mr. Fraley agreed with them, by telephone, to a price of \$4.00 for the size 30 lettuce and \$7.00 for the size 24 lettuce, plus cooling, subsequent to the resale of the lettuce.

Complainant submitted a sworn statement by Mr. Fraley denying the allegations of Mr. Taback and Mrs. Howerton. Mr. Fraley also stated as follows:

Following this inspection, I was contacted by Mr. Allen Taback of Post and Taback, Inc. Mr. Taback attempted to settle this matter based on an adjustment. Also on the line with us was Mr. Pete Nalbandian of Nalbandian Farms. During this discussion Mr. Taback offered to settle this matter based on remitting \$4.00 per carton on the 30's and \$7.00 per carton on the 24's. However, both Mr. Nalbandian and I refused to accept that offer as settlement.

Complainant did not place in evidence an affidavit by Mr. Nalbandian. Since Mr. Taback's testimony is supported by that of the broker, a relatively neutral third party, we find that respondent has proved by a preponderance of the evidence that there was an agreement to change the terms of the contract to price after sale, and a subsequent agreement that such price should be \$4.00 per carton for the size 30 and \$7.00 per carton for the size 24's.

Under the new agreement the total price, including cooling and temperature recorder, agreed upon between the parties for the 840 cartons of lettuce would amount to \$4,063.50. Respondent has already paid complainant this amount. Accordingly, the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,942)

4 R FRUIT & VEGETABLE CO. v. HOULEHAN, INC. PACA Docket No.
2-6162. Decided October 24, 1983.

Rejection, ineffective—Contract, breach of.

Edward M. Silverstein, Presiding Officer
Complainant and Respondent, *pro se*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$3,938.00, in connection with two transactions, in interstate commerce, involving grapefruit, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's report of investigation. In addition the parties were given the opportunity to file further evidence by way of sworn statements, however, neither party did so. Also, neither party filed a brief.

FINDINGS OF FACT

1. Complainant, 4 R Fruit & Vegetable Co., is a corporation whose mailing address is P.O. Box 1469, Mission, Texas 78572.
2. Respondent, Houlehan, Inc., is a corporation whose mailing address is 9238 Ward Parkway, Suite 225, Kansas City, Missouri 62114. At all material times, respondent was licensed under the Act.
3. On or about March 11, 1982, complainant sold respondent one truck-load of grapefruit, consisting of 300 1 1/4 Bulk #112's Ruby Red Grapefruit #1 (@ \$6.15 (\$1,845.00), 100 1 1/4 Bulk #96's Ruby Red Grapefruit #1 (@ \$7.65 (\$765.00), and 150 1 1/4 Bulk #96's Ruby Red Grapefruit #2 (@ \$5.00 (\$750.00), for a total f.o.b. price of \$3,360.00. Because neither respondent nor complainant was able to get a truck until March 15, 1982, the grapefruit was not shipped until that date. During the period March 11-15, the grapefruit sat on complainant's loading dock. The average temperature during that period of time, at complainant's location, was about 81°F.

Cite as 42 A.D. 1655

4. On March 16, 1982, the truckload of grapefruit arrived at respondent's customer's location in Springfield, Missouri. Upon arrival, respondent's customer (Associated Wholesale Grocer's, Inc.) rejected the load to respondent. The load was then diverted to A. Reich & Sons, Kansas City, Missouri, which also rejected it. Respondent, without complainant's acquiescence, placed the grapefruit with Central Produce, Kansas City, Missouri. Subsequent thereto, and after receiving payment from Central Produce, respondent paid complainant \$1,150.00.

5. On or about March 15, 1982, respondent purchased another truckload of grapefruit from complainant consisting of 550 1 ½ Bulk #96's Ruby Red Grapefruit #2 @ \$4.80, for a total f.o.b. price of \$2,640.00. The grapefruit was shipped on March 16. When respondent's truck picked up the grapefruit, it was not in a cooler and was warm. The temperature of the grapefruit was reduced by the truck's refrigeration unit.

6. on March 18, 1982, the truckload of grapefruit arrived at respondent's customer's location in Kansas City. Respondent's customer (A. Reich & Son) rejected the grapefruit to respondent. A federal inspection was ordered which reflected the following in regard to the grapefruit's condition: "Generally firm. Serious damage by skin breakdown totals 3 fruit (1%). Decay in most samples 1 to 3 fruit (3 to 9%) in some none, total 13 fruit (4%) Green Mold Rot and Blue Mold Rot each mostly in advanced, many in early stages." The grapefruit was graded as follows: "Meets quality requirements but fails to grade U.S. No. 2 only account of condition."

7. Complainant agreed, after the result of the inspection was reported to it, that the grapefruit could be handled for its account. Subsequent thereto, respondent paid complainant \$912.00.

8. On August 23, 1982, complainant filed a formal complaint. This was within nine months of when the causes of action herein accrued.

CONCLUSION

The instant reparation complaint concerns two shipments of grapefruit. As to the first, it does not appear that respondent made a proper rejection. Respondent claims that its customers rejected this load. However, while respondent claims to have been in touch with complainant during this period of time, it does not appear to have rejected the load to complainant in a prompt manner. A rejection must be clear and unmistakable in order to be effective. *Jarson v. Tavilla*, 30 Agri. Dec. 1360 (1971). Since respondent did not make such a rejection, we conclude that it accepted the grapefruit, and is responsible for the full contract price thereof, less any payments, and less any damages resulting from

Cite as 42 A.D. 1658

a breach of contract by complainant. *Stockton Tomato v. Albee Tomato*, 28 Agric. Dec. 1051 (1969). While respondent has made certain allegations from which we might conclude that complainant breached its contract had respondent offered any proof in support thereof, it has offered no proof of a breach by complainant, nor proof of damages. Such proof could have been a federal inspection, and an account of sales. Consequently, we hold that respondent is obligated to complainant in the amount of \$2,210.00 (the contract price of \$3,360.00 less its payment of \$1,150.00), and that its failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

As the second shipment, respondent has shown that complainant breached their contract. This evidence consisted of a sworn statement that the grapefruit was warm when picked up, and the federal inspection certificate which showed the grapefruit failed to meet the grade required by the parties' contract. It is also apparent that complainant approved the handling of this load for its account. Respondent accounted for this load at the rate of \$1.66 per carton which it claims was the average price received. While complainant challenges this accounting, it has failed to sustain its burden of proving its allegation that the accounting was irregular. *L. Torn & Son v. Gerber*, 20 Agric. Dec. 790 (1961). Its complaint regarding this shipment must, therefore, be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay complainant, as reparation, \$2,210.00 plus interest at the rate of 13% per annum from April 1, 1982, until paid.

Copies hereof shall be served on the parties.

(No. 22,943)

ADOLPH B. CIMINO, d/b/a THE ADOLPH B. CIMINO, CO. v. SA-SO POULTRY SALES CO., INC., a/t/a VALENTINE FOODS. PACA Docket No. 2-6291. Decided October 24, 1983.

Brokerage Fees.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.

Robert G. Bauer, Philadelphia, Pennsylvania, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$1,149.00 in connection with 11 transactions involving fruits and vegetables in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to the complainant. The amount claimed as damages in the complaint does not exceed \$15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant is an individual, Adolph B. Cimino doing business as the Adolph B. Cimino Company, with an address at 470 Calaveras Drive, Salinas, California.

2. Respondent, Sa-So Poultry Sales Co., Inc., is a corporation also trading as Valentine Foods with an address of 906 North American Street, Philadelphia, Pennsylvania. At the time of the transactions involved in this proceeding respondent was licensed under the Act.

3. Between October 11, 1982 and October 19, 1982 complainant acted as broker to respondent with respect to 11 loads of produce, negotiating contracts between various sellers and respondent, which produce was shipped from California to respondent in Philadelphia, Pennsylvania. Respondent received and accepted the goods, but failed to pay complainant brokerage in the amount of \$1,149.00 as set forth below:

Complainant's Invoice Number	Date Shipped	Brokerage
9084	October 11, 1982	\$ 126.00
9085	October 11, 1982	63.00
9085	October 11, 1982	67.20
9086	October 11, 1982	129.60
9089	October 12, 1982	63.00
9089	October 12, 1982	67.20
9096	October 16, 1982	126.00

<u>Complainant's Invoice Number</u>	<u>Date Shipped</u>	<u>Brokerage</u>
9097	October 16, 1982	120.00
9098	October 16, 1982	129.75
2101	October 19, 1982	129.00
2102	October 19, 1982	128.25
	Total	\$1,149.00

4. A formal complaint was filed on March 21, 1983, which was within nine months of the time the cause of action herein arose.

DISCUSSION

Complainant claims that with respect to 11 transactions involving perishable agricultural commodities shipped from California to Philadelphia, Pennsylvania during October, 1982 it acted as broker. It further claims that it should have received from respondent as brokerage fees \$1,149.00, but that respondent has failed to pay it this amount. In support of these allegations complainant provided a sworn statement that it had acted as broker with respect to the 11 transactions, and submitted broker's memoranda of sale showing its entitlement to such brokerage fees. In its answer respondent denied that it had failed to pay complainant the amounts of money involved, and submitted in support of its denial an illegible accounts payable ledger which it claimed pertained to the account of complainant. Therefore, it is not possible to determine what the accounts payable ledger said. In any event, on February 10, 1983, Robert G. Bauer, Esq. of Philadelphia, Pennsylvania, acting as attorney for respondent, wrote a letter to the Department of Agriculture in which he said as follows:

Sa-So had entered into loan agreement with a lender whereby the lender advanced funds to Sa-So, taking as collateral a security interest in Sa-So's, accounts receivable. The lender called its loans and Sa-So was unable to obtain interim financing. Consequently, the lender enforced its security interest and liquidated the company. Sa-So, as a result, had no source from which to pay the debt.

The debt involved in Mr. Bauer's letter was the obligation to complainant. Based upon this information we conclude that respondent has failed to pay complainant the \$1,149.00 with which we are concerned in this proceeding. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant as reparation \$1,149.00, with interest thereon at the rate of 13 percent per annum from November 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,944)

HOMESTEAD TOMATO PACKING CO., INC. *v.* MURRAY G. CRAWFORD PRODUCE CO. PACA Docket No. 2-6217. Decided October 25, 1983.

Notice of rejection—Wrongful rejection.

Since tomatoes made good delivery, rejection was wrongful; in any event a notice of rejection must be clear and unmistakable to be effective.

Edward M. Silverstein, Presiding Officer.

Complainant, *pro se*.

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$5,121.30 in connection with one transaction, in interstate commerce, involving tomatoes, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to file further evidence by way of sworn statements, however, neither party did so. Respondent filed a brief.

FINDINGS OF FACT

1. Complainant, Homestead Tomato Packing Co., Inc., is a corporation whose mailing address is P.O. Box 3064, Florida City, Florida 33034.

2. Murray G. Crawford, is an individual doing business as Murray G. Crawford Produce Co., whose mailing address is Route 1, Box 193B, Faison, North Carolina 28341. At all material times, respondent was licensed under the Act.

3. On or about January 23, 1982, in the course of interstate commerce, complainant, by oral contract, sold to respondent a truckload of tomatoes, a perishable agricultural commodity, consisting of 1,794 20 lb cartons at \$9.50 per carton plus \$.50 per carton for gassing, \$.15 per carton for palletizing, and \$22.50 for a Ryan temperature recorder, for a total f.o.b. price of \$18,231.60. The tomatoes were required to be 85% U.S. No. 1. The tomatoes were shipped to respondent's customer, C. Annicelli Fruit & Produce Co., in New Haven, Connecticut.

4. Upon receipt on January 25, 1982, respondent's customer notified the respondent that the tomatoes were decayed, and that he was getting a federal inspection on them. Respondent notified the broker, John Rogers Sales Co., who in turn notified Tom Banks, the salesman for complainant. Tom Banks gave the broker permission to tell the receiver that it could handle the tomatoes on account if the result of the inspection warranted a rejection.

5. On January 25, 1982, at about 1:30 in the afternoon, the tomatoes were inspected at respondent's customer's warehouse. In pertinent part, that inspection reflected the condition of the tomatoes, as follows: "Average approximately 70% turning and pink, 30% light red and red, 2% decay." The inspection certificate indicated that respondent's customer notified the inspector that 1,794 cartons were to be inspected. On February 2, 1982, some of the tomatoes remaining from the shipment were inspected for a second time at respondent's customer's location. Although the inspection certificate reflected that 1,794 cartons were to be inspected, respondent admits that some of the tomatoes had been previously sold. The condition of the remaining tomatoes was reflected on the inspection certificate as follows: "Average approximately 90% light red and red. Decay in most samples 3 to 18%, in many none, average 8%, Gray Mold Rot and/or Watery Rot in various stages."

6. Respondent received \$18,992.00 from its customer with regard to this shipment. This represented payment for 1,760 cartons at \$8.00 per carton, less \$44.00 for the January 25 inspection, and less \$44.00 for the February 1 inspection. Respondent remitted \$13,200.00 of this money to complainant.

7. An informal complaint was filed by complainant on July 7, 1982. This was within nine months of when the cause of action herein accrued.

CONCLUSIONS

The first issue for decision in this case is whether or not respondent properly rejected the tomatoes. We hold that it did not. The contract between the parties called for the tomatoes to merely be 85% U.S. No. 1. The inspection certificate makes clear that they were well within this grade requirement. Consequently, if respondent rejected the tomatoes, such rejection was improper. Moreover, the evidence does not indicate that respondent conveyed a clear and unmistakable rejection to complainant. Such a notice is required before a rejection is effective. *Jarson v. Tavilla*, 30 Agric. 1360 (1971). Consequently, we conclude that the tomatoes were accepted by respondent. Inasmuch as respondent accepted the tomatoes, it is obligated to complainant for the full contract price less any payment made, and less any damages resulting from a breach of contract by complainant. Inasmuch as the tomatoes satisfied the parties' agreement as evidenced by the broker's memorandum, we hold that respondent has failed to satisfy its burden of proving that complainant breached the contract. Consequently, it is obligated to complainant for the full contract price, less its \$13,200.00 payment already made.

Two issues need to be resolved to compute the agreed contract price. First, complainant invoiced respondent at the rate of the \$.05 per carton for "FREIGHT TO GAS HOUSE." This charge is not supported by the record in that it is not a usual charge, and is not noted on the broker's memorandum. We, therefore, hold that respondent is not liable for this charge. Second, respondent claims it only agreed to buy 1,760 cartons. However, while the broker's memorandum supports this figure, the complainant billed respondent for 1,794 cartons, to which invoice respondent did not promptly object, and respondent's customer twice reported to the federal inspector that there were 1,794 cartons in the lot. We hold, therefore, that there were 1,794 cartons of tomatoes involved in this load.

In view of the above, we hold that respondent is obligated to complainant in the amount of the contract price, \$18,231.60, less the amount paid \$13,200.00, or \$5,031.60. Respondent's failure to pay complainant this amount is a violation of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days of receipt of this order, respondent shall pay to complainant \$5,031.60 as reparation with interest thereon at the rate of 13% per annum from March 1, 1982, until paid.

Copies of this order shall be served on the parties.

(No. 22,945)

MIDWEST PRODUCE BROKERAGE, INC. v. ARNOLD'S PRODUCE INC.,¹⁴
CORPORATED. PACA Docket No. 2-6240. Decided October 25, 1983.

Dumping discrepancy.

Dennis Becker, Presiding Officer.

Complainant, *pro se*.

James K. Secret, Tulsa, Oklahoma, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$1,000 in connection with the sale of a mixed truckload of vegetables in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability to complainant. Respondent also filed a setoff or counterclaim. Complainant filed an answer to the setoff or counterclaim. The amounts claimed as damages in both the complaint and the setoff or counterclaim did not exceed \$15,000.00. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Respondent filed an answering statement. Complainant filed a statement in reply. Neither party filed a brief.

FINDING OF FACT

1. Complainant, Midwest Produce Brokerage, Inc., is a corporation with an address at 133 East Atkinson Plaza, Suite 202, Midwest City, Oklahoma. At the time of the transaction involved in this proceeding complainant was licensed under the Act.

2. Respondent, Arnold's Produce, Inc., is a corporation with an address at 50 North Trenton Street, Tulsa, Oklahoma. At the time of the transaction in issue in this proceeding respondent was licensed under the Act.

3. On June 17, 1982, complainant sold to respondent a partial truckload of mixed vegetables, including 285 cartons of lettuce, for a total contract price of \$6,946.95. The produce was shipped from California on June 17, 1982, and arrived in Tulsa, Oklahoma on or about June 21, 1982, where it was received and accepted by respondent. Respondent paid complainant \$5,946.95 of the contract price.

4. The lettuce on the truck was purchased from Merit Packing Company, and had a trade name of "Bit-O-Gold." On June 21, 1982, respondent dumped about 250 cartons of lettuce with the trade name "Mark-O-Merit."

5. A formal complaint in this proceeding was filed on November 15, 1982, which was within nine months of the time the cause of action herein arose.

DISCUSSION

This proceeding arises because respondent contends that it received lettuce in the transaction with which we are concerned which had to be dumped because it was of poor quality. There is no issue as to whether respondent accepted the entire load of produce, including the lettuce. Therefore, respondent has the burden of proof to show that the lettuce did not make good delivery, and that as a result it was damaged because complainant breached the contract. *Rydell California Potato Co. v. The Kaufman Brown Potato Company*, 16 Agric. Dec. 1055 (1957). In support of its contention respondent submitted a dump certificate from a Trash Company known as Otis Collins Trash & Container Service showing 250 cases of Mark O. Merit Lettuce were dumped. However, the invoice submitted by complainant shows that there were 285 cartons of Bit-O-Gold lettuce in the partial truckload, and no Mark O. Merit. Respondent has not explained this discrepancy. Thus, respondent has failed to carry its burden of proof that the lettuce dumped was that which it received from complainant. For these reasons we need not reach questions as to whether the lettuce was shown not to have commercial value, or whether respondent made timely complaint to complainant as regards the condition of the lettuce. In view of the above respondent's failure to pay complainant \$1,000 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest. The counterclaim and setoff, which did not clearly state a claim, should be dismissed.

ORDER

Within thirty days from the date of this order, respondent shall pay the complainant, as reparation, \$1,000, with interest thereon at the rate of 18 percent per annum from July 1, 1982, until paid.

The setoff and counterclaim in this proceeding is dismissed.
Copies of this order shall be served upon the parties.

(No. 22,946)

SALINAS MARKETING COOPERATIVE *v.* E. ARMATA, INC. PACA Docket No. 2-6251. Decided October 25, 1983.

Suitable shipping condition.

Dennis Becker, Presiding Officer.

Thomas R. Oliveri, Newport Beach, California, for complainant.
Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation in the amount of \$6,472.94 in connection with the sale of a carload of cauliflower in interstate commerce.

Copies of the Report of Investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Since the amount claimed as damages does not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Neither party did so. Neither did either party file a brief.

FINDINGS OF FACT

1. Complainant, Salinas Marketing Cooperative, is a corporation with an address at P.O. Box 3860, Salinas, California.
2. Respondent, E. Armata, Inc., is a corporation with an address at 114-117 Hunts Point Terminal Market, Bronx, New York. At the time of the transaction involved in this proceeding respondent was licensed under the Act.
3. On July 27, 1982, complainant sold to respondent a van containing 1,172 cartons of cauliflower at \$6.00 per carton for a contract price of

7,032, plus cooling at 85 cents per carton for a total of \$996.20, and a Ryan recording thermometer for \$22.50 for a total contract price of \$8,050.70, F.O.B. The produce was shipped from California to respondent at the Bronx, New York where it arrived on or about August 2, 1982, and was subjected to a federal inspection.

4. The federal inspection referred to in paragraph 3, above, showed a pertinent part as follows:

Condition of Equipment: Temperature controls in operation.

Products Inspected: CAULIFLOWER in cartons printed "Stately Brand, Grown Packed & Shipped by Salinas Marketing Cooperative Salinas, Calif Produce of USA" marked "12 heads." Applicant states 1172 cartons.

Condition of Load: Through 2 pallets wide. 2 rows 14 layers. Lengthwise, Crowswise load.

Condition of Pack: Tight, heads individually film wrapped.

Temperature of Product: Ranges 46 to 65 F.

Condition: Jacket leaves: Mostly fresh and green. 1 to 4 heads in most cartons none in some, average 13% Bacterial Soft Rot in various stages affecting 1 to 4 leaves. Curds creamy white color and compact. 3 to 6 heads per carton at average 33% damage by brown to black discoloration. 1 to 6 heads per carton, average 37% decay occurring as soft brown mushy areas.

Remarks: Inspection and certificate restricted to product and lading in 8 pallets being unloaded at time of inspection and 2 pallets nearest rear doors. Condition only reported account excessive condition defects. This certificate is a more detailed report of certificate No. B 15494 ordered at applicant's request.

5. The Ryan Temperature Recorder showed during transit that the temperatures on the truck were consistently at 35°F for the duration of the trip. When tested, the recording instrument was shown to conform to specifications with respect to both time and temperature, showing a potential temperature variation of plus or minus 3°F.

6. The cauliflower was rejected by respondent, which then handled for complainant's account. Respondent provided an account of sales which showed that after deducting expenses it received net proceeds of 1,577.76 which it paid to complainant.

7. A formal complaint was filed on February 18, 1983, which was within nine months of the time of the cause of action herein arose.

DISCUSSION

There appears to be no disagreement between the parties as regards whether the cauliflower was in satisfactory condition when it arrived in New York, on or about August 2, 1982, after five days in transit from California. The inspection certificate issued by the federal inspector showed 13% bacterial soft rot, 33% damage by brown to black discol-

oration, and 37% decay showing soft brown mushy areas. 83% condition defects is very high for cauliflower after five days in transit. What is an issue is whether the condition defects arose as a result of difficulty during transportation or because the cauliflower was not in suitable shipping condition when placed aboard the truck for transit. Complainant claims that there were problems with the temperature during transit. It claims that the recording thermometer, which showed an average of 35°F temperature throughout the trip must have been out of order because temperatures never drop immediately upon the loading of a truck, and remain absolutely consistent throughout a trip. Complainant requested the Thermagard Corporation, the business responsible for provision of the recording thermometer, to test it for accuracy. Thermagard Corporation did so, and reported that the "Unit(s) in question conforms to all published specifications with respect to TIME and TEMPERATURE," and showed that as regards time it was within plus or minus 1% accurate, and with respect to temperature it was within plus or minus 3°F in terms of accuracy. Therefore, even assuming that the temperature was 3° higher than that shown on the recording device, we find that 38°F is a normal temperature for the transportation of cauliflower.

Because of the very high percentage of condition defects the presumption must be that the cauliflower was not in suitable shipping condition. Thus, complainant has the burden of proof of show otherwise. Complainant has failed to do so. Respondent sold the cauliflower for complainant's account. It provided an account of sales which showed that it netted \$1,577.76 after deducting expenses for inspection, handling, delivery, cartage, terminal fees, freight, and a commission at 8%. This account of sales was not challenged. Therefore, we find that it accurately reflects the net proceeds realized by respondent for the account of complainant. In view of the above we conclude that the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,947)

TOM MOORE COMPANY, INC. v. AMIGOMEX, INC. PACA Docket No. 2-6260. Decided October 25, 1983.

Agency.

Dennis Becker, Presiding Officer.

complainant, *pro se.*
Robert F. Barnes, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$7,965.00 in connection with the sale of a truckload of onions in interstate commerce.

A default order was issued on February 11, 1983, but the case was reopened on April 25, 1983 because respondent showed good cause as to why it had not answered. Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filled an answer thereto denying liability to the complainant. Because the amount claimed as damages does not exceed \$15,000 the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and a statement in reply. Respondent filed an answering statement. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Tom Moore Company, Inc., is a corporation with an address at P.O. Box 1627, Nyssa, Oregon.
2. Respondent, Amigomex, Inc., is a corporation with an address at P.O. Box 278, Hidalgo, Texas. At the time of the transaction involved in this proceeding respondent was licensed under the Act.
3. On December 29, 1981, complainant, acting as the sales agent for Beltham Growers, Inc., sold to respondent through Gateway Produce Brokerage Co., Inc., located in St. Louis, Missouri, which acted as the broker in this transaction, a truckload consisting of 900 fifty pound bags of Idaho round yellow onions, U.S. No. 1, clean and fairly bright, 2½ inches to 3 inches, at \$6.75 per bag, plus \$2.10 per bag for freight, f.o.b. Gateway Produce Brokerage Co. agreed to invoice and collect from respondent, and remit to complainant with respect to the contract price. On December 30, 1981, the onions were shipped from Weiser, Idaho to

Hidalgo, Texas, and arrived at that location on or about January 3, 1982. Respondent received and accepted the onions, but failed to pay for them.

4. Gateway Brokerage Produce Company dealt with Mr. Silver Lamas, who was prior to December 1981, during December 1981 and for some time subsequent thereto, the manager of respondent. The broker agreed to invoice and collect from respondent, and remit to complainant the contract price.

5. Silver Lamas was acting on his own behalf with respect to the purchase of the onions without properly notifying entities with whom he was dealing that he was doing so. At the time he did so the respondent knew that Mr. Lamas was trading for his own account even though he was an employee of respondent. Respondent was basically a watermelon dealer, and was not doing business during December, 1981.

6. An informal complaint was filed on July 15, 1982, which was within nine months of the time the cause of action herein arose.

DISCUSSION

The parties are not in disagreement as to the basic facts in this proceeding. However, they disagree as to the legal conclusion that should be drawn from those facts. During December, 1981, respondent was not doing business. However, its manager, Silver Lamas, was transacting business for his own account without letting businesses from which he was making purchases know that he was doing so. He was, in fact, trading on the business name of respondent. With respect to the transaction in issue, he dealt with Gateway Brokerage Produce Co., Inc., seeking to purchase a truckload of onions for delivery to a customer in Monterey, Mexico. Gateway got in touch with complainant, which agreed to sell the onions to respondent, believing that Mr. Lamas was acting as agent for respondent. Complainant provided uncontroverted testimony that it only deals with businesses which are listed in the Blue Book.

The broker's Confirmation of Sale, issued on December 29, 1981, shows that the produce was sold to respondent. This is the best evidence, because it is derived from an independent and impartial source, as to the understanding of complainant as to who it was selling the produce, and also as to whether there had been proper representations made by Mr. Lamas as to who was, in fact, the buyer, himself or his employer. Mr. Lamas apparently never disclaimed his affiliation with respondent either to complainant or to the broker. Most importantly, the Confirmation of Sale was sent to respondent, which did not object to it. In addition, complainant provided uncontroverted testimony in the form of an affidavit that the truckdriver of Wayne Daniel Truck, Inc., delivered the onions to the business address of respondent.

Finally in a deposition by Mr. Lamas to Robert F. Barnes, the attorney for respondent, Mr. Lamas stated that respondent knew from the time he went to work for it that he was also operating on his own. Respondent did not dispute this statement. In view of all of these factors, I cannot conclude other than that complainant, as well as the broker, is entitled to rely on the representations of Mr. Lamas that he was acting as an agent of respondent. He clearly had the apparent authority to do so. Respondent never took action to repudiate the understanding between complainant and the broker, thereby leaving them with the impression that he was the buyer. It has long been held that when an agent acts with apparent authority for the benefit of his principal, the other party in a transaction involving perishable agricultural commodities has the right to rely on such apparent authority, and that the principal is bound by the acts of its agents. Where a principal by any act or conduct knowingly uses or permits another to appear as his agent, he is estopped to deny that such person acted as his agent. *George Arkelian Farms, Inc. v. Standard O'Day Co., et al.*, 31 Agric. Dec. 1895 (1972). In view of our conclusion in this regard respondent must pay complainant \$7,965.00.

Failure to do so is a violation of section 2 of the Act for which reparations should be awarded to complainant with interest.

ORDER

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, \$7,965.00, with interest thereon at the rate of 3% per annum from February 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,948)

GATEWAY PRODUCE EXCHANGE CO., INC. v. RIO FRESH, INC. PACA
cket No. 2-6160. Decided October 27, 1983.

ker.

ward M. Silverstein, Presiding Officer.
plainant and Respondent, *pro se*

cision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely

complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,075.70, in connection with the brokerage on 26 transactions involving perishable agricultural commodities which moved in interstate commerce.

A copy of the Department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint, and filed an answer thereto denying any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties were considered a part of the evidence of the case, as is the Department's report of investigation. The answer since it was not verified was not considered in evidence. The parties were given the opportunity to file further evidence by way of sworn statements. Complainant filed a verified opening statement, respondent a verified answering statement, and complainant filed a verified statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Gateway Produce Exchange Co., Inc., is a corporation whose mailing address is Number 97 Produce Row, Room 202, St. Louis, Missouri 63102.

2. Respondent, Rio Fresh, Inc., is a corporation whose mailing address is P.O. Box 968, San Juan, Texas 78589. At all material times, respondent was licensed under the Act.

3. During the period November 28, 1981 through April 8, 1982, complainant, acting as a broker for respondent sold, in the course of interstate commerce, 26 truckloads of Texas vegetables, all being perishable agricultural commodities, to J. Randazzo & Sons, Inc., hereinafter "Randazzo," Cleveland, Ohio. Respondent shipped the 26 truckloads of vegetables to Randazzo, and the latter accepted the same and paid respondent for them.

4. With regard to the 26 shipments of vegetables to Randazzo, the respondent is obligated to complainant in the amount of \$3,237.60 for brokerage, of which amount respondent has paid complainant \$1,161.90.

5. The informal complaint was filed by complainant on May 13, 1982, which was within nine months of when the causes of action herein accrued.

CONCLUSIONS

The instant complaint concerns the brokerage on 26 shipments of vegetables made by respondent to J. Randazzo & Sons, Inc., in Cleve-

Cite as 42 A.D. 1673

l, Ohio. The complainant alleges that it acted as a broker for respondent on all of these transactions, and that it is entitled to brokerage 5 cents per package on them. The respondent has made many alterations concerning the payment practices of J. Randazzo & Sons, Inc., as to the payment practices of complainant when it collected on respondent's behalf. However, the respondent at no time denied that complainant acted as a broker for it on all of these transactions. It at some point in time in the respondent took away from complainant right to invoice and collect on its behalf does not in any way amount denial that the complainant acted as a broker on the respondent's behalf with regard to the shipments which took place after the date. before, on the basis of all of the evidence in this proceeding, we conclude that the respondent is obligated to complainant in the amount sought by complainant, or \$2,075.70. Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which arbitration plus interest should be awarded.

ORDER

Within thirty days from the date of this order, respondent shall pay complainant, as reparation, \$2,075.70 with interest thereon at the rate of 3 percent per annum from March 1, 1982, until paid. Copies of this order shall be served upon the parties.

(No. 22,949)

BIGGER'S BROTHERS, INC. v. PRODUCE PRODUCTS, INC. PACA Docket 2-6195. Decided October 27, 1983.

Statute of Limitations—Jurisdiction.

Since the transaction occurred more than nine months of the filing of an informal complaint, the Secretary lacks jurisdiction over the subject matter.

James Becker, Presiding officer.

Complainant and Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely

complaint was filed in which complainant sought an award of reparation in the amount of \$4,689.61 in connection with the sale of a carload of potatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant. The amount claimed as damages in the complaint does not exceed \$15,000. Therefore, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are part of the evidence in the case as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Complainant filed an opening statement and a statement in reply. The respondent filed an answering statement and a brief.

FINDINGS OF FACT

1. Complainant, Bigger's Brothers Inc., is a corporation with an address at Box 34156, Charlotte, North Carolina.
2. Respondent, Produce Products, Inc., is a corporation with an address at 231 E. Imperial Highway, Suite 230, Fullerton, California. At the time of the transaction involved in this proceeding Respondent was licensed under the Act.
3. On February 1, 1981, complainant bought a carload of fresh potatoes from respondent, which carload was located at Francis Produce Company, Greenville, South Carolina. The purchase was made pending federal inspection. The potatoes had originally been shipped from Royal City, Washington. After receiving the potatoes on or about February 12, 1981, and a federal inspection having been secured, complainant made certain deductions, and paid respondent \$11,628.00 out of the total invoice price of \$18,935.50, on March 25, 1981. Among the deductions made by complainant was a deduction of \$4,689.61 which was due the Seaboard Coast Line Railroad Company as freight for shipment of the potatoes. Subsequently, after discussions with respondent, complainant paid to respondent \$4,689.61 on May 20, 1981, as the amount of freight due, in the belief that respondent would pay the freight. Complainant also paid that amount to the railroad on April 29, 1982 because respondent had not done so.
4. An informal complaint was filed with the Department of Agriculture on March 15, 1982, which was more than nine months after the cause of action alleged herein accrued.

DISCUSSION

The Department of Agriculture lacks jurisdiction over this proceeding. Pursuant to 7 U.S.C. 499f(a) "any person complaining of any violation of any provision of Section 2 of this Act . . . may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition" for relief. Even viewing this matter in the light most favorable to complainant, more than nine months elapsed between the time the cause of action accrued and when the informal complaint was filed. The transaction occurred on or about February 12, 1981, and that is the normal date from which the nine month limitation would be computed. Assuming that the payment of freight to respondent on May 20, 1981, is the latest date in which the cause of action could have accrued, because it was on that date that the complainant made payment for the freight to respondent, thus giving rise to this dispute, the informal complaint not having been filed until March 15, 1982, nine months and 5 days had elapsed. When more than nine months elapses from the time of cause of action accrues, this Department is powerless to take any action. See *Jebavy-Sorenson Orchard Company v. Lynn Foods Corporation*, 32 Agric. Dec. 529 (1973). We are further compelled to draw this conclusion because complainant received a bill for the freight on March 24, 1981, and was on notice from that time forward that the railroad was looking to it for payment. Respondent could not mislead under the circumstances. Thus once complainant paid respondent the freight, it had an obligation to move quickly to assure that the railroad was paid. While it had correspondence with respondent in the interim, it did not diligently pursue its interest. Therefore, we conclude that the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,950)

SUN WORLD INTERNATIONAL INC. v. BRUNO DISPOTO COMPANY. PACA
Docket No. 2-6219. Decided October 27, 1983.

Broker.

Jennis Becker, Presiding Officer.
Complainant and Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$25,586.85 in connection with the sale of a carload of oranges in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to the complainant. Although the amount claimed as damages in the complainant exceeds \$15,000.00, the parties did not request an oral hearing. Therefore, the shortened of method of procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) was appropriate for use. Under this procedure the verified pleadings of the parties are a part of the evidence in the case as is the Department's Report of Investigation. In addition the parties were given the opportunity to file evidence in the form of verified statements. Neither party did so. Neither party filed a brief.

FINDINGS OF FACT

1. Complainant, Sun World International, Inc., is a corporation with a business address at 5544 California Ave., Suite 280, Bakersfield, California.

2. Respondent Bruno Dispoto, is an individual doing business as Bruno Dispoto Company with an address of P.O. Box 1148, Delano, California. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On May 5, 1982, complainant sold to Commercial Buying Agency in Detroit, Michigan one carload of Valencia oranges containing 2,664 cartons for a total contract price of \$21,592.00, plus \$4,250.00 for freight and \$11.25 for one half the cost of a temperature recorder, for a total contract price of \$25,853.25, f.o.b.

4. The oranges described in paragraph 3, above, were shipped from Riverside County, California to Detroit, Michigan on May 13, 1982, and arrived at that location on May 20, 1982, where they were accepted by Commercial Buying Agency.

5. Complainant originally invoiced respondent for a total cost of \$21,386.85, having neglected to put the freight charge \$4,250.00 on the

Invoice, and having deducted brokerage in the amount of \$266.40 which it alleged was being paid to respondent. Subsequently complainant issued a corrected invoice in the total amount of \$25,586.85 which included freight and the \$266.40 deduction for brokerage which it claimed was due respondent. Respondent issued a broker's memorandum of sale which showed the buyer as:

Ship to: BRUNO DISPOTO COMPANY
COMMERCIAL BUYING AGENCY
7201 West Fort
Detroit, Michigan 48209

Respondent's memorandum of sale also showed that it was "to invoice or shippers account collection."

6. A formal complaint was filed on December 7, 1982, which was within one month of the time the cause of action herein arose.

CONCLUSIONS

This proceeding involves a dispute in which complainant claims it sold a carload of oranges to respondent for delivery to respondent's customer, Commercial Buying Agency in Detroit, Michigan. Respondent, on the other hand, claims it was acting as broker in the transaction, and had agreed to invoice and collect for complainant's account. Complainant originally issued an invoice for the full contract price of the oranges plus one half the cost of a temperature recorder, less brokerage at 10 cents per carton to respondent. Subsequently, it issued a corrected invoice which included the above-mentioned costs and deductions, and also the cost of freight. Respondent claims the cost of freight was incorrectly invoiced. It is immaterial when complainant invoiced the charge for freight since it is uncontested that complainant paid it in this free on board transaction. Therefore, the purchaser of oranges would be liable for the freight, and it is appropriate that an invoice for the amount of the freight be submitted.

Based on the documentary evidence available in this proceeding, and the sworn testimony of the parties, we conclude that respondent was acting as a broker who would invoice and collect for the account of complainant from Commercial Buying Agency. Commercial Buying Agency did not pay respondent. Therefore, respondent had no obligation to pay complainant. We draw our conclusion because the broker's memorandum of sale issued by respondent was not immediately challenged by complainant. While it is true that the buyer is stated as Bruno Dispoto Company with shipment to be Commercial Buying Agency, we do not believe such inconsistency is fatal since the memorandum also said that respondent was invoicing and collecting for complainant's account. It is

not uncommon for the name of the buyer to also include the broker's name. Our conclusion in this regard is further reinforced because complainant's invoice shows a deduction for brokerage which both parties agree was paid to respondent. It is inconsistent for brokerage to be paid to a purchaser of perishable agricultural commodities. Indeed, it is contrary to the requirements set forth in 7 CFR 46.28(d) that "when a person purchases or sells produce as a dealer, he shall not request or receive a brokerage fee from the buyer or the seller."

Finally, since complainant is asserting that respondent was the purchaser it has the burden of proof to show that such is the case. *Royal Packing Co. v. Grand Prairie Produce Brokerage, Inc.*, 34 Agric. Dec. 1600 (1975). It attempted to do so through the use of its invoice and an argument. In addition, it included a statement by its salesman, Jerry Holt, in which he claimed that "the only way we would accept the order was to sell rail to the Bruno Dispoto Co., Delano, California, shipping to Commercial Buying in Detroit." However, Mr. Holt's statement was not sworn. Respondent, on the other hand submitted a sworn answer in which it claimed that it was a broker which agreed to collect and remit for the account of complainant. This sworn statement was not controverted by complainant, and must be accepted as true in the absence of other persuasive evidence. See *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (1982). Therefore, we conclude that the complaint should be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,951)

PHELAN & TAYLOR PRODUCE v. FAVA & COMPANY, INC. PACA Docket No. 2-6407. Decided October 27, 1983.

Admission of liability.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of \$2,367.60 in connection with a shipment of

mixed vegetables in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto, admitting the material allegations of the complaint, including the indebtedness claimed by complainant. However, respondent claimed to have paid complainant \$300.00. Complainant was asked to confirm this payment, and did so. Accordingly, the issuance of an order as the \$2,067.60 restraining of complainant's claimed damages without further procedure is appropriate, pursuant to section 47.8(d) of the Rules of Practice (7 CFR 17.8(d)).

Complainant, Phelan & Taylor Produce is a corporation whose mailing address is P.O. Box 458, Oceano, California 93445-0458. Respondent, 'ava & Company, Inc., is a corporation whose mailing address is 24-8 Fairlawn Avenue, Fairlawn, New Jersey 07410. At the time of the transaction involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as the findings of fact of this order; except that it is concluded that respondent was complainant \$2,067.60, rather than \$2,367.60. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b) and have resulted in damages to complainant of \$2,067.60. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$2,067.60, with interest thereon at the rate of 13 percent per annum from June 1, 1983, until paid.

Copies of this order shall be served upon the parties.

(No. 22,952)

IDAHO BONDED PRODUCE & SUPPLY CO. v. FARM MARKET SERVICE,
c. PACA Docket No. 2-6116. Decided October 31, 1983.

Assignment, breach of duty—Resale price differential.

Brew Y. Stanton, Presiding Officer.
Complainant and Respondent, *pro se*.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award agai

respondent in the amount of \$1,269.25 in connection with the alleged sale of a quantity of potatoes in interstate commerce.

A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto, denying liability to complainant.

Since the amount claimed as damages does not exceed \$15,000, the shortened procedure provided in section 47.20 of the Rules of Practice (7 CFR 47.20) is applicable. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements and to file briefs, but declined to do so.

FINDINGS OF FACT

1. Complainant, Idaho Bonded Produce & Supply Co., is a corporation whose address is Route 1, Box 19, Idaho Falls, Idaho.

2. Respondent, Farm Market Service, Inc., is a corporation whose address is 2516 2nd Street West, Birmingham, Alabama. At the time of the transaction alleged herein, respondent was licensed under the Act.

3. On approximately October 6, 1981, complainant consigned to respondent, by oral contract, 725 sacks of Idaho potatoes, U.S. No. 1. The contract was entered into between John J. Stanger, President of complainant, and Larry Merrill, representing respondent. Merrill informed Stanger that, after deducting freight, handling, and commission, complainant should receive approximately \$10.00 to \$10.50 per sack. The parties agreed that complainant would send respondent an invoice with a price stated on it of \$10.50 f.o.b., but it was understood that such price was only for the benefit of complainant's accounting division, and a specific price had not actually been set.

4. On October 7, 1981, complainant secured a shipping point inspection of the potatoes at issue, which found no decay to be present.

5. On October 7, 1981, complainant shipped the potatoes at issue to respondent, in interstate commerce, and they arrived at respondent's place of business shortly thereafter.

6. On October 8, 1981, complainant sent respondent an invoice, which indicated a price of \$10.50 f.o.b., and made no mention of the fact that the goods had been consigned.

7. On December 4, 1981, complainant received a check from respondent for \$6,843.25.

8. Complainant received a speed message from respondent dated December 11, 1981, which indicated that respondent had sold the potatoes for \$15.20 per sack, and had deducted \$3.80 per sack for freight,

\$.40 per sack for handling, and \$2.25 per sack for commission, for a net return of \$8.75 per sack, or \$6,345.25 for the 725 sacks. The speed message did not show the proceeds of the individual sales, but noted the results of all the sales combined.

9. The Market News Service Reports for Atlanta, Georgia, shows that Idaho potatoes sold for a minimum of \$16.00 per sack from October 13, 1981 through November 6, 1981, and \$15.50 per sack from November 7, 1981 through December 10, 1981.

10. Complainant filed a formal complaint for \$1,269.25 on April 15, 1982, which was within nine months from the time the cause of action herein accrued.

CONCLUSIONS

Complainant alleges that it sold to respondent 725 sacks of Idaho potatoes at \$10.50 per sack, and claims damages constituting the difference between this alleged sale price and the \$8.75 per sack remitted although this difference totals \$1,268.75 and the amount erroneously alleged in the complaint is \$1,269.25). Respondent contends that the transaction was a consignment and that it properly performed its duties as a consignee in reselling the potatoes and remitting the net proceeds to complainant.

The evidence in the record shows clearly that the transaction agreed to was a consignment, not a sale. This is evident from a December 28, 1981, letter from complainant's President, John G. Stanger, to respondent's representative, Larry Merrill (complainant's Exhibit No. 6 attached to the complaint), which states as follows, in relevant part: "I do not imply that you did guarantee a minimum price of \$10.25 to \$10.50 if you did mention that based upon your current sales and with the deduction of freight, handling charges and your commission that we could net back approximately \$10.00 to \$10.50." Mr. Stanger's reference to freight, handling charges, and commission, terms which are associated with consignment, not sales, shows that he was fully aware that the parties had entered into a consignment arrangement, as respondent has claimed.

As a consignee, respondent had the duty to promptly and properly sell the potatoes, render an accounting to complainant, and pay over to complainant the net proceeds after deducting the necessary expenses incurred in the resale. *Stoops & Wilson, Inc. v. Wholesale Produce Exchange*, 41 Agric. Dec. 290 (1982).

Respondent claims to have sold the potatoes at \$15.20 per sack, less \$8 per sack freight, \$.40 per sack handling, and \$2.25 per sack commission, for a total of \$8.75 per sack. Complainant does not appear to

Failure to pay full purchase price—Proper rejection of set-off transaction.

Edward M. Silverstein, Presiding Officer.

Complainant, *pro se*

Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award in the amount of \$8,172.10, in connection with three transactions, in interstate commerce, involving tomatoes, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint. Although respondent was in default in the filing of an answer, the default was set aside, and respondent's answer was ordered to be filed. *Bello-Tomato, Inc. v. Arend Ferwerda d/b/a Arend Ferwerda Wholesale Produce Broker*, 42 Agric. Dec. 480 (1983). In its answer, respondent denied any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence of the case, as is the Department's report of investigation. The answer, since it was not verified, was not considered to be in evidence. In addition to the verified pleadings and the report of investigation, the parties were given the opportunity to file further evidence by way of sworn statements. Respondent filed a verified answering statement, and complainant filed a verified statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Bello-Tomato, Inc., is a corporation whose mailing address is 9208 West Highland Pines Boulevard, Palm Beach Garden, Florida, 33410.
2. Respondent, Arend Ferwerda, is an individual doing business as Arend Ferwerda Wholesale Produce Broker, whose mailing address is 101 N.E. 23rd Street, Fort Lauderdale, Florida 33305. Respondent, all material times, was licensed under the Act.

dispute respondent's deductions, but alleges that the \$15.20 price obtained by respondent was about \$.80 per sack below the low prices indicated by the Market News Service Reports for this period (report of investigation, Exhibit No. 1E). We do not know from respondent's summary of its resales whether such resales were properly made, as the proceeds of the individual sales are not identified. We must, therefore, compare respondent's reported resales with the prevailing sales prices for Idaho potatoes during the time respondent allegedly made its resales, from about October 10, 1981 through December 10, 1981. These sales prices can be determined by looking at the Market News Service Reports for Atlanta, Georgia, the city for which reports are published that is the closest to respondent's place of business in Birmingham, Alabama. An examination of the available listings reveals selling prices of from \$16.00 to either \$17.00 or \$18.00 per sack from October 13, 1981 through November 6, 1981, and from \$15.50 to \$16.50 per sack from November 9, 1981 through December 10, 1981. We thus assume that respondent should have been able to obtain at least \$16.00 per sack during approximately half the time period during which it made sales, and \$15.50 per sack during the remainder of the period, an average of approximately \$15.75 per sack. This is \$.55 per sack greater than the amount it claims to have received. Respondent has offered no explanation of this difference in price. We thus hold that respondent has violated its duty to complainant to properly resell the potatoes.

Complainant's damages due to respondent's breach are the amount respondent should have obtained on resale less the amount respondent actually obtained on resale, or \$.55 per sack for each of the 725 sacks of potatoes, a total of \$398.75. See *Joseph A. Relan d/b/a Relan Produce Farms v. Georgia Vegetable Co., Inc.*, 41 Agric. Dec. 559 (1982). Respondent's failure to pay this sum is a violation of section 2 of the Act, for which reparation should be awarded, with interest.

ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$398.75, with interest thereon at the rate of 13 percent per annum from January 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,953)

BELLO-TOMATO, INC. v. AREND FERWERDA, d/b/a AREND FERWERDA WHOLESALE PRODUCE BROKER. PACA Docket No. 2-6225. Decided October 31, 1983.

'ailure to pay full purchase price—Proper rejection of set-off transaction.

Edward M. Silverstein, Presiding Officer.
Complainant, *pro se*
Stephen P. McCarron, Silver Spring, Maryland, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks a reparation award in the amount of \$8,172.10, in connection with three transactions, in interstate commerce, involving tomatoes, a perishable agricultural commodity.

A copy of the Department's report of investigation was served on both parties. Respondent also was served with a copy of the complaint. Although respondent was in default in the filing of an answer, the default was set aside, and respondent's answer was ordered to be filed. *Bello-Tomato, Inc. v. Arend Ferwerda d/b/a Arend Ferwerda Wholesale Produce Broker*, 42 Agric. Dec. 480 (1983). In its answer, respondent denied any liability to complainant.

Since the amount claimed as damages did not exceed \$15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 CFR §47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. The answer, since it was not verified, was not considered to be in evidence. In addition to the verified pleadings and the report of investigation, the parties were given the opportunity to file further evidence by way of sworn statements. Respondent filed a verified answering statement, and complainant filed a verified statement in reply. Respondent also filed a brief.

FINDINGS OF FACT

1. Complainant, Bello-Tomato, Inc., is a corporation whose mailing address is 9208 West Highland Pines Boulevard, Palm Beach Garden, Florida, 33410.
2. Respondent, Arend Ferwerda, is an individual doing business as Arend Ferwerda Wholesale Produce Broker, whose mailing address is 11 N.E. 23rd Street, Fort Lauderdale, Florida 33305. Respondent, at all material times, was licensed under the Act.

3. On February 19, and 26, and March 8th, 1982, in the course of interstate commerce, complainant, by oral contract, sold three loads of tomatoes to respondent at a total F.O.B. price of \$8,795.65. These tomatoes were grown, packed and shipped to complainant from the Bahamian Islands. Upon arrival of the tomatoes, respondent accepted the same but has paid complainant only \$623.55.

4. On or about September 16, and September 18, 1981, complainant purchased two truckloads of tomatoes from respondent through Dock Case Brokerage Company, for shipment to Canada at a total F.O.B. price of \$19,264.00. Upon arrival, the tomatoes failed to meet the required grade, and were rejected by complainant. Complainant's rejection terminated its participation in these transactions. Subsequent to complainant's rejection, respondent permitted these loads to be handled for its account and has received \$11,091.90 as payment from Bell City Brands Limited, 70 Grand River Avenue, Brantford, Ontario, Canada.

5. The formal complaint was received on October 29, 1982, which was within nine months of when the cause of action herein accrued.

CONCLUSIONS

The respondent admits receiving and accepting the three loads of tomatoes made the subject of the complaint. However, the respondent asserts as a set-off in defense, that the complainant ordered, received and accepted two loads of tomatoes from it in 1981, but that complainant failed to pay the full contract price for those two shipments. The evidence, however, indicates that the complainant rejected, and properly rejected, the two shipments of tomatoes. This evidence consist of the statement of Dock Case, of the Dock Case Brokerage Company, who acted as the broker for these transactions. Mr. Case further states that complainant's rejection ended its participation in these two transactions. We, therefore, conclude that respondent is not entitled to a set-off in the amounts claimed.

As further defense, respondent claims that the respondent has failed to prove that these tomatoes were in interstate or foreign commerce. Its claim is based upon complainant's alleged failure to establish that the tomatoes came from the Bahamas. We are satisfied, however that the complainant has proven this point.

Therefore, on the basis of all the evidence, we conclude that the respondent is obligated to complainant in the amount \$8,172.10, and that its failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

ORDER

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, \$8,172.10, with interest thereon at the rate of 13 percent per annum from April 1, 1982, until paid.

Copies of this order shall be served upon the parties.

(No. 22,954)

GRADY PRUETTE v. LARRY E. TROVER, d/b/a LARRY TROVER PRO-
CE. PACA Docket No. 2-6264. Decided October 31, 1983.

Decision—Suitable shipping condition.

James Becker, Presiding Officer.
L. E. Leatherman, Lincolntown, North Carolina, for complainant.
Respondent, pro se.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought an award of reparation in the amount of \$6,415.00 in connection with the sale of a truckload of tomatoes in interstate commerce.

Copies of the report of investigation made by the Department were served upon the parties. A copy of the formal complaint was served upon respondent which filed an answer thereto denying liability to complainant. Since the amount claimed as damages in the complaint did not exceed \$15,000 the shortened method of procedure provided in section 7.20 of the Rules of Practice (7 CFR 47.20) is applicable. Under this procedure the verified pleadings of the parties are a part of the evidence in the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements. Neither party did so. Neither did either party file brief.

FINDINGS OF FACT

1. Complainant, Grady Pruette, is an individual with a business address at P.O. Box 239 Immokalee, Florida.
2. Respondent, Larry D. Trover, is an individual doing business as

Larry Trover Produce with a place of business located at Route 1, Tunnel Hill, Illinois. At the time of the transaction involved in this proceeding respondent was subject to license under the Act.

3. On May 19, 1982 Complainant sold to respondent a truckload of tomatoes consisting of 1,448 twenty five pound cartons of various sizes at various prices plus \$.15 per carton brokerage for a total contract price of \$6,415.00, f.o.b. The tomatoes were inspected at shipping point and shown to grade U.S. No. 3. They were shipped from Immokalee, Florida on May 19, 1982, and arrived in Tunnel Hill, Illinois on May 21, 1982, where they were subjected to a federal inspection. The inspection certificate showed in pertinent part:

Products Inspected: TOMATOES in Cartons, Printed "Selected Tomatoes, Grady Pruette Immokalee, Fla. Net Wt. 25 lbs. 11.3 K.G. Produce of U.S.A." Stamped to denote size. Stamped as noted 6×6 LGR, 6×7, 5×6, 6×6, 6×7, 7×7. Manifested as 1448 25 lb. Cartons.

Condition of Load: Through Load, Stacked on pallets—9 layers high—8 cartons per layer.

Condition of Pack: Fairly well filled—Jumble Pack.

Condition: Tomatoes average approximately 15% green to breakers, 35% turning to pink, 6% light red to red. Decay ranges from 4 to 18% Average 10% Watery Rot and Gray Mold Rot. Soft ranges from 4 to 16% Average 8%, Bruise range from 4 to 10% Average 3%.

Remarks: Inspection Certificate restricted at Applicant's request to condition.

4. Respondent rejected the tomatoes. The broker, Gary Mackey, arranged to have the load of tomatoes handled by Jerry Lowe in Chattanooga, Tennessee on consignment for the benefit of complainant. The record does not show whether Mr. Lowe provided an account of sales to complainant, or whether he remitted net proceeds from the sales.

5. A formal complaint was filed on December 16, 1982, which was within nine months of the time the cause of action herein arose.

DISCUSSION

Complainant, as the proponent of the fact that it has not been paid for tomatoes sold and shipped to respondent, has the burden of proof that they were in suitable shipping condition when loaded at shipping point since they were rejected by respondent. *Heggeblade-Marguleas-Tenneco, Inc. v. Fisher Foods, Inc.*, 33 Agric. Dec. 1443 (1974). Complainant has failed to do so. Respondent did not provide any evidence in its defense of which this tribunal may take notice because it did not follow 7 CFR 47.20(h) with respect to the verification of the only document it filed, namely its answer. Such verification is necessary in lieu of the swearing of a witness, and notarization is insufficient to attest to

the truth of the statements made. We can, however, take notice of the inspection certificate of the federal inspection service as *prima facie* evidence of the accuracy of the facts contained therein. That inspection showed that there was a total of 21% condition defects, including an average of 10% Watery Rot and Gray Mold Rot, which is decay, and soft tomatoes averaging 8%. Pursuant to 7 CFR 51.1861(d)(2), not more than 15% of tomatoes in any lot may fail to meet the requirements for the grade at destination. Furthermore, not more than 5% of the tomatoes may be soft or affected by decay. In an F.O.B. sale good delivery at destination requires not more than 8% of the tomatoes are soft or decayed, which was obviously exceeded in this transaction. Complainant made no allegation that shipping conditions were not normal. Therefore, there is no basis on which to find that the condition defects were the responsibility of respondent.

In view of the above complainant has failed to sustain its burden of proof. Respondent correctly rejected the tomatoes. Therefore, the complaint in this proceeding must be dismissed.

ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 22,955)

GRIFFIN & BRAND OF McALLEN, INC. v. FAVA & COMPANY. PACA
Docket No. 2-6406. Decided October 31, 1983.

Admission of liability.

Decision by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant sought a reparation award against respondent in the amount of \$11,026.15 in connection with shipments of mixed fruit in interstate commerce. A copy of the formal complaint was served upon respondent, which filed an answer thereto admitting the material allegations of the complaint, including the indebtedness claimed by complainant. However, respondent claimed to have paid complainant \$500.00. Complainant was asked to confirm the payment, and did so. Accordingly, the issuance of an order as to the \$10,526.15 remaining of complainant's claimed damages without further

procedure is appropriate, pursuant to section 47.8(d) of the Rules and Practice (7 CFR 47.8(d)).

Complainant, Griffin & Brand of McAllen, Inc. is a corporation whose mailing address is P.O. Box 1840, McAllen, Texas 78501. Respondent, Fava & Company, Inc., is a corporation whose mailing address is 24-28 Fairlawn Avenue, Fairlawn, New Jersey 07410. At the time of the transactions involved herein, respondent was licensed under the Act.

The facts alleged in the formal complaint are hereby adopted as the findings of fact of this order, except that it is concluded that respondent owes complainant \$10,526.15, rather than \$11,026.15. On the basis of these facts, we conclude that the actions of respondent are in violation of section 2 of the Act (7 U.S.C. 499b), and have resulted in damages to complainant of \$10,526.15. Accordingly, within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$10,526.15, with interest thereon at the rate of 13 percent per annum from May 1, 1983, until paid.

Copies of this order shall be served upon the parties.

(No. 22,956)

G. A. B. PRODUCE DISTRIBUTORS, INC. v. FRUITEX CORPORATION, and/or LARRY ELMER, INC. PACA Docket No. 2-6410. Decided October 31, 1983.

Payment of undisputed amount.

Decision by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely informal complaint was filed on September 1, 1982, and a formal complaint was filed on February 14, 1983. Complainant seeks to recover \$10,328.00 which amount is alleged to be the total purchase price for two truckloads of mangoes sold to and accepted by respondents during July 1982. Respondents filed an answer to the formal complaint on August 9, 1983, admitting that \$9,278.00 of the amount claimed by complainant was due and owing to complainant on account of the transaction involved herein.

Section 7(a) of the Act (7 U.S.C. 499g(a)) provides in part:

If after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as dam-

ages, the Secretary . . . may issue an order directing the respondent to pay the complainant the undisputed amount . . . leaving the respondent's liability for the disputed amount for subsequent determination.

Accordingly, under the authority of the above quoted section, respondents, jointly or severally, shall pay to complainant, as an undisputed amount, \$9,278.00. Payment of this amount shall be made within 30 days from the date of this order with interest thereon at the rate of 13 percent per annum from August 1, 1982, until paid. A failure to pay this amount within 30 days will constitute a violation of section 2 of the Act. 7 U.S.C. 499b.

Respondents' liability for payment of the disputed amount is left for subsequent determination in the same manner and under the same procedure as if no order for payment of the undisputed amount had been issued.

Copies of this order shall be served upon the parties.

MISCELLANEOUS REPARATION ORDERS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER.

(No. 22,957)

COOK SALES COMPANY v. FARM 2-U. PACA Docket No. 2-6125. Order issued September 2, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on July 27, 1983, awarding reparation to the complainant in the amount of \$1,415.75. By a telegram received August 23, 1983, respondent has moved that this matter be reconsidered.

Accordingly, the order of July 27, 1983 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

(No. 22,958)

J.A. WOOD Co.-VISTA INC. v. MOVSOVITZ & SONS OF FLORIDA, INC
PACA Docket No. 2-6250. Order issued September 6, 1983.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$6,972 in connection with a transaction involving the shipment of green onions and lettuce in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated August 4, 1983, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim, and authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

(No. 22,959)

R. F. TAPLETT FRUIT & COLD STORAGE Co. *v.* MAGGIE-PAUL, INC.
PACA Docket No. 2-6278. Order issued September 9, 1983.

DENIAL OF MOTION FOR STAY.

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on June 17, 1983, awarding reparation to the complainant in the amount of \$168,175. By letter received August 12, 1983, respondent has moved that this matter be stayed due to respondent having filed a petition in bankruptcy pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. 701 *et seq.*) on July 18, 1983.

However, the Default Order indicates that payment must be made within 30 days from the date of the Order or July 17, 1983. Therefore, the Order became final at that time and the Secretary lost jurisdiction (7 U.S.C. 499j). Accordingly, respondents' motion for the issuance of a Stay Order is hereby denied.

Copies of this order shall be served upon the parties.

(No. 22,960)

VIRGINIA FRUIT SALES SERVICE INC. *v.* MAGGIE-PAUL, INC. PACA
Docket No. 2-6279. Order issued September 9, 1983.

DENIAL OF MOTION FOR STAY

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order

was issued on June 17, 1983, awarding reparation to the complainant in the amount of \$28,281.50. By letter received August 12, 1983, respondent has moved that this matter be stayed due to respondent having filed a petition in bankruptcy pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. 701 *et seq.*) on July 13, 1983.

However, the Default Order indicates that payment must be made within 30 days from the date of the Order, or July 17, 1983. Therefore, the Order became final at that time and the Secretary lost jurisdiction (7 U.S.C. 499j). Accordingly, respondent's motion for the issuance of a Stay Order is hereby denied.

Copies of this order shall be served upon the parties.

(No. 22,961)

BLUE ANCHOR, INC. v. MAGGIE-PAUL, INC. PACA Docket No. 2-6280. Order issued September 9, 1983.

DENIAL OF MOTION FOR STAY

In this reparartion proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on June 17, 1983, awarding reparation to the complainant in the amount of \$10,474.50. By letter received August 12, 1983, respondent has moved that this matter be stayed due to respondent having filed a petition in bankruptcy pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. 701 *et seq.*) on July 13, 1983.

However, the Default Order indicates that payment must be made within 30 days from the date of the Order, or July 17, 1983. Therefore, the Order became final at that time and the Secretary lost jurisdiction (7 U.S.C. 499j). Accordingly, respondent's motion for a Stay Order is hereby denied.

Copies of this order shall be served upon the parties.

(No. 22,962)

JOE PHILLIPS, INC. v. G & T TERMINAL PACKAGING CO., INC. PACA Docket No. 2-5769. Order issued September 12, 1983.

DENIAL OF REQUEST FOR RECONSIDERATION AND REHEARING

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Decision and Order was issued on September 15, 1982, awarding reparation to complainant against respondent for \$22,793.50 plus interest.

and an additional \$3,148.57 plus interest for fees and expenses. Respondent moved to rehear, reargue and reconsider the decision. On July 28, 1983, a Decision on Rehearing, Reargument and Reconsideration was issued, upholding the September 15, 1982, order. An Order Correcting Prior Order, dealing with non-substantive matters, was issued on August 22, 1983. In a letter dated August 10, 1983, respondent has moved that the July 28, 1983, order be reconsidered and it be permitted to present additional evidence. This motion is hereby denied, as the Rules of Practice do not provide for any additional review by the Secretary subsequent to a decision on rehearing, reargument and reconsideration.

Copies of this order shall be served upon the parties.

(No. 22,963)

SIX L'S PACKING COMPANY, INC. v. WINSTON C. BAILEY d/b/a CLAUDE BAILEY PRODUCE COMPANY. PACA Docket No. 2-6042. Order issued September 15, 1983.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), an order was issued on April 11, 1983, awarding reparation to complainant against respondent in the amount of \$156.00, with interest thereon at the rate of 13 percent from December 1, 1981, until paid. On May 9, 1983, and within the time allowed therefor, respondent filed a Petition for Reconsideration.

Respondent's objections to the Decision and Order of April 11, 1983, were fully answered therein, and upon reconsideration we find that the order of April 11, 1983, is supported by the evidence and the law applicable thereto. Accordingly, the petition is dismissed without serving a copy thereof upon complainant.

The reparation awarded in our order of April 11, 1983, shall be paid within thirty (30) days from the date of this order.

Copies hereof shall be served upon the parties.

(No. 22,964)

SALINAS MARKETING COOPERATIVE v. ED. A. KEIL PRODUCE, INC. PACA Docket No. 2-6171. Order issued September 15, 1983.

ORDER ON RECONSIDERATION

A Decision and Order was issued in this proceeding on August 1, 1983, awarding reparation to complaint in the amount of \$2,649.20 plus interest with respect to the sale of a truckload of lettuce and cauliflower in interstate commerce. On August 4, 1983, respondent filed a petition for reconsideration, so that this tribunal could consider evidence inadvertently omitted by respondent from its "Statement In Reply." A Stay Order was issued on August 29, 1983 so that this tribunal could determine whether the matter warrants reconsideration.

In due course respondent submitted the missing documents, and in particular an invoice it issued to Mandell Produce dated May 14, 1982, with respect to 454 cartons of lettuce it sold to Mandell at \$2.00 per carton. Accepting as true the statement on the invoice that the lettuce involved is from the transaction with which we are concerned here, we find that it still lacks sufficient probative value to warrant the conclusion that \$2.00 was a fair price for the lettuce received on May 3, 1982. When produce is defective, the receiver has an obligation to dispose of it promptly so as to mitigate damages. An ostensible eleven day delay is too long with regard to lettuce. In addition, respondent claimed that the lettuce was sold by Mandell for respondent's account. If such were the case respondent should have received an accounting from Mandell, not issued an invoice to it. Therefore, we have no alternative other than to conclude that respondent has still failed to prove damages.

We also found in our Decision that respondent did not show it gave timely notice to complainant that there were problems with the lettuce. Respondent claims that the broker, Ritter & Co., takes responsibility for giving such notice. By implication, respondent claims it is absolved from responsibility for not doing so because of this practice. The law is otherwise. 7 CFR 46.2(dd) provides that "Acceptance" means "(3) failure of the consignee to give notice of rejection to the consignor within a reasonable time . . ." (here 12 hours in accordance with 7 CFR 46.2(cc)(1)). It does not place responsibility on the broker.

Since respondent's contentions lack merit, to Petition for Reconsideration is dismissed.

(No. 22,965)

TOM BENGARD RANCH, INC. a/t/a KLEEN HARVEST v. GARDEN STATE FARMS, INC. PACA Docket No. 2-5994. Order issued September 2, 1983.

RULING ON PETITION FOR RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Decision and Order was issued on May 4, 1983, awarding reparation to complainant in the amount of \$207.50. Complainant filed a petition for reconsideration, and a Stay Order was issued on June 23, 1983. Respondent filed a brief in opposition to the petition.

In its petition, complainant basically argues that the Decision and Order erred in utilizing respondent's accountings in determining respondent's damages for breach of warranty. Complainant contends that the market price for lettuce in fair condition, set forth in the Market News Service Reports, should have been used, since respondent's accountings resulted from mishandling. We cannot agree, as the proceeds alleged to be derived from respondent's resale are consistent with the condition of the lettuce at the time of delivery to respondent. Further, even if use of the Market News Service Reports quotations for lettuce in fair condition were appropriate, only those quotations for the date of delivery of shipment A pertain to lettuce of California origin, the kind involved here, with no such quotations for the date of delivery of shipment B. However, shipment A, which exhibited 8% decay and 9% tip-burn in the head leaves, was in less than fair condition at the time of delivery.

For the reasons set forth above, the Petition for Reconsideration is hereby denied. The June 23, 1983, Stay Order is hereby vacated, and the amount awarded in the May 4, 1983, Decision and Order shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

(No. 22,966)

H. HALL & CO., INC. v. BRUCE D. LOFCHIE d/b/a BRUCE CO. PACA
Docket No. 2-6323. Order issued September 23, 1983.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$3,356.10 in connection with a transaction involving the shipment of strawberries in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated July 27, 1983, respondent notified the Department that it had

ndered to complainant a check in full settlement of complainant's claim. Complainant, in a telephone conversation with the Department, confirmed the settlement and authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

(No. 22,967)

OGIER HARLOFF PACKING, INC. v. FRESH PRODUCE, INC. PACA Docket No. 2-5971. Order issued October 6, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Decision and Order was issued on August 25, 1983, awarding reparation to the complainant in the amount of \$18,889.49. By letter received September 13, 1983, respondent has moved that this matter be reconsidered.

Accordingly, the order of August 25, 1983 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

(No. 22,968)

ALLINAS MARKETING COOPERATIVE v. ED. A. KEIL PRODUCE, INC. PACA Docket No. 2-6171. Order issued October 13, 1983.

ORDER ON RECONSIDERATION

A Decision and Order was issued in this proceeding on August 1, 1983, awarding reparation to complainant in the amount of \$2,649.20 plus interest with respect to the sale of a truckload of lettuce and cauliflower interstate commerce. On August 4, 1983, respondent filed a petition for reconsideration, so that this tribunal could consider evidence inadvertently omitted by respondent from its "Statement in Reply." A Stay Order was issued on August 29, 1983 so that this tribunal could determine whether the matter warrants reconsideration.

In due course respondent submitted the missing documents, and in particular an invoice it issued to Mandell Produce dated May 14, 1982,

with respect to 454 cartons of lettuce it sold to Mandell at \$2.00 per carton. Accepting as true the statement on the invoice that the lettuce involved is from the transaction with which we are concerned here, we find that it still lacks sufficient probative value to warrant the conclusion that \$2.00 was a fair price for the lettuce received on May 3, 1982. When produce is defective, the receiver has an obligation to dispose of it promptly so as to mitigate damages. An ostensible eleven-day delay is too long with regard to lettuce. In addition, respondent claimed that the lettuce was sold by Mandell for respondent's account. If such were the case respondent should have received an accounting from Mandell, not issued an invoice to it. Therefore, we have no alternative other than to conclude that respondent has still failed to prove damages.

We also found in our Decision that respondent did not show it gave timely notice to complainant that there were problems with the lettuce. Respondent claims that the broker, Ritter & Co., takes responsibility for giving such notice. By implication, respondent claims it is absolved from responsibility for not doing so because of this practice. The law is otherwise. 7 CFR 46.2(dd) provides that "Acceptance" means (3) failure of the consignee to give notice of rejection to the consignor within a reasonable time . . . (here 12 hours in accordance with 7 CFR 46.2(cc)(1)). It does not place responsibility on the broker.

Since respondent's contentions lack merit, the Petition for Reconsideration is dismissed. The Stay is vacated, and the Order dated August 1, 1983, is reinstated, except that the reparation awarded in that Order shall be paid within 30 days from the date of this Order.

(No. 22,969)

BUD ANTLE, INC. v. MAILLEY-QUALITY PRODUCE COMPANY, INC. PACA
Docket No. 2-6352. Order issued October 25, 1983.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$21,075.80 in connection with 7 transactions involving the shipment of mixed vegetables in interstate commerce.

A copy of the formal complaint was served on respondent. By letter dated October 4, 1983, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim. Complainant, in its letter of October 4, 1983, authorized dismissal of its complaint filed herein.

**Accordingly, the complaint is hereby dismissed.
Copies of this order shall be served upon the parties.**

(No. 22,970)

**ALTERS PRODUCE, INC. v. FRANCIS PRODUCE COMPANY, PACA Docket
No. 2-6025. Order issued October 28, 1983.**

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), an order was issued on September 15, 1983, awarding reparation to the complainant the amount of \$15,746.94. By petition received September 27, 1983, respondent has moved that this matter be reconsidered.

Accordingly, the order of September 15, 1983 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reconsider.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

REPARATION DEFAULT DECISIONS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 22,971)

JOSEPH H. WILLIAMS *v.* FRESH PAK INC. PACA Docket No. RD-83-249. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$5,624.96 plus 13 percent interest per annum from August 1, 1982, until paid.

(No. 22,972)

BRAND BROTHERS PRODUCE INC. *v.* GOURMET GALLERY INC. PACA Docket No. RD-88-374. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$1,061.00 plus 13 percent interest per annum from January 1, 1983, until paid.

(No. 22,973)

BIANCHI & SONS PACKING CO. *v.* ROGER A. MEAD d/b/a WEAVER PRODUCE. PACA Docket No. RD-88-376. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$7,396.20 plus 13 percent interest per annum from October 1, 1982, until paid.

(No. 22,974)

ANDREW SMITH CO. *v.* INTERNATIONAL PRODUCE CORPORATION. PACA Docket No. RD-88-377. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$3,593.70 plus 13 percent interest per annum from January 1, 1983, until paid.

(No. 22,975)

NORTHERN ORCHARD CO. INC. *v.* RON GAMBINO d/b/a G.R.S. WHOLESALE NURSERY & PRODUCE. PACA Docket No. RD-88-378. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$6,177.00 plus 13 percent interest per annum from March 1, 1983, until paid.

(No. 22,976)

DELRAY PRODUCE CORP. *v.* J G S PRODUCE CORP. PACA Docket No. RD-88-379. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$120,019.07 plus 13 percent interest per annum from May 1, 1982, until paid.

(No. 22,977)

GEORGIA TOMATO Co., INC. v. GOURMET GALLERY INC. PACA Docket No. RD-83-380. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$6,388.00 plus 13 percent interest per annum from February 1, 1983, until paid.

(No. 22,978)

GATEWAY POTATO CORPORATION v. CHARLES E. GRANT AND DONALD LINS d/b/a MOBILE PRODUCE. PACA Docket No. RD-83-381. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$3,612.58 plus 13 percent interest per annum from April 1, 1983, until paid.

(No. 22,979)

MIELKE'S POTATO FARM v. ALASKA GOLDEN NUGGET, INC. PACA Docket No. RD-83-382. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$6,444 plus 13 percent interest per annum from October 1, 1982, until paid.

(No. 22,980)

BASIN POTATO Co. v. RUDOLF N. VON WINNING d/b/a VON WIR DISTRIBUTING Co. PACA Docket No. RD-83-383. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$3, plus 13 percent interest per annum from July 1, 1982, until paid.

(No. 22,981)

G. CEFALU & BROS., INC. v. THOMAS AND STEVENS INC. PACA No. RD-83-384. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$8 plus 13 percent interest per annum from August 1, 1982, until paid.

(No. 22,982)

BECKER FARMS INC. v. INTERNATIONAL FINE FOODS INC. Formerly: CHOY FOODS CORP. PACA Docket No. RD-83-385. Decided September 1, 1983.

Respondent was ordered to pay complainant, as reparation, \$2,000.00 plus 13 percent interest per annum from November 1, 1982, until paid.

(No. 22,983)

EXETER PACKERS, INC. v. PRIME-PAC, INC. a/t/a J & S POTATO COMPANY and/or NETWORK BROKERAGE INC. PACA Docket No. RD-83-386. Decided September 1, 1983.

The complaint against respondent Network Brokerage Inc. was dismissed because there was not sufficient evidence to hold it liable.

Respondent, Prime-Pac, Inc. a/t/a J & S Potato Company, was ordered to pay complainant, as reparation, \$14,332.45 plus 13 percent interest per annum from November 1, 1982, until paid.

(No. 22,984)

ABATTI PRODUCE, INC. v. DAN GARCIA BROKERAGE, INC. PACA Docket No. RD-83-328. Decided September 9, 1983.

The Default Order issued July 26, 1983, is hereby stayed, pending the filing of a Petition to Reopen by respondent.

Respondent was ordered to pay complainant an undisputed amount of \$70,189.25 plus 13 percent interest per annum from April 1, 1983, until paid.

Respondent's liability for payment of the disputed amount is left for subsequent determination.

(No. 22,985)

PETE ZELDENRUST AND HANK VANDER WALL v. THE COST PRODUCE COMPANY, INC. PACA Docket No. RD-83-387. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$13,406.80 plus 13 percent interest per annum from December 1, 1982, until paid.

(No. 22,986)

UCON PRODUCE, INC. v. A. BENANDI & SON INC. PACA Docket No. RD-83-388. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$2,840.00 plus 13 percent interest per annum from June 1, 1983, until paid.

(No. 22,987)

DAVID W. BROCK AND DONALD E. BROCK d/b/a SIGNAL PRODUCE COMPANY v. SAMUEL R. DAINES INTERNATIONAL INC. PACA Docket No. RD-83-389. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$3,965.94 plus 13 percent interest per annum from April 1, 1983, until paid.

(No. 22,988)

H. HALL & CO., INC. v. DE FEO PACKERS & DISTRIBUTORS INC. PACA Docket No. RD-83-390. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$14,468.75 plus 13 percent interest per annum from November 1, 1982, until paid.

(No. 22,989)

D. J. NELSON d/b/a NELSON FARMS v. RICHMOND PRODUCE CO., INC., and/or RICHMOND PRODUCE COMPANY OF STOCKTON, INC. PACA Docket No. RD-83-391. Decided September 13, 1983.

Respondents were ordered to pay complainant, as reparation, \$26,128.27 plus 13 percent interest per annum from January 1, 1983, until paid.

(No. 22,990)

SAULSBURY BROS. INC. v. DESERT AUTOMATED FARMING INC. a/t/a VINCE FARMS INC. PACA Docket No. RD-83-393. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$200.00 plus 13 percent interest per annum from October 1, 1982, until paid.

(No. 22,991)

MORRIS OKUN INC. v. STANLEY & JOE RUSSO. PACA Docket No. RD-83-394. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$3,594.00 plus 13 percent interest per annum from August 1, 1982, until paid.

(No. 22,992)

BRAVO DISTRIBUTORS INC. v. KENNETH P. DAVIS d/b/a CENTRAL VIRGINIA PRODUCE Co. PACA Docket No. RD-83-395. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$14,608.50 plus 13 percent interest per annum from April 1, 1983, until paid.

(No. 22,993)

NUCHIEF SALES INC. v. WE SHENG FOOD INDUSTRY (USA) Co. INC. PACA Docket No. RD-83-396. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$86,761.00 plus 13 percent interest per annum from January 1, 1983, until paid.

(No. 22,994)

FLEMING COMPANIES, INC. v. PAPPAS & Co. PACA Docket No. RD-83-397. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$1,852.50 plus 13 percent interest per annum from September 1, 1982, until paid.

(No. 22,995)

FORLIZZI BROS. INC. v. COMMONWEALTH FRUIT & PRODUCE Co. INC. PACA Docket No. RD-83-398. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$13,650.80 plus 13 percent interest per annum from August 1, 1982, until paid.

(No. 22,996)

WILLIAM Y. MURPHEY d/b/a NATIVE AMERICAN FARMS v. AMERICAN PRODUCE Co. PACA Docket No. RD-83-399. Decided September 13, 1983.

Respondent was ordered to pay complainant, as reparation, \$26,863.90 plus 13 percent interest per annum from August 1, 1982, until paid.

(No. 22,997)

D & K FROZEN FOODS INC. v. DESERT AUTOMATED FARMING INC. a/t/a VINCE FARMS. PACA Docket No. RD-83-400. Decided September 20, 1983.

Respondent was ordered to pay complainant, as reparation, \$24,882.00 plus 13 percent interest per annum from February 1, 1983, until paid.

(No. 22,998)

HUNT OIL COMPANY a/t/a PLANTATION PRODUCE COMPANY v. ARNOLD J. RODIN INC. PACA Docket No. RD-83-401. Decided September 20, 1983.

Respondent was ordered to pay complainant, as reparation, \$47,367.25 plus 13 percent interest per annum from February 1, 1983, until paid.

(No. 22,999)

UNITED APPLE SALES INC. v. MARTHA M. DEFRONZO d/b/a EASTERN PRODUCE Co. PACA Docket No. RD-83-402. Decided September 20, 1983.

Respondent was ordered to pay complainant, as reparation, \$8,445.00 plus 13 percent interest per annum from October 1, 1982, until paid.

(No. 23,000)

CULIACAN PRODUCE COMPANY, INC. v. WESTERN PRODUCE, INC. PACA Docket No. RD-83-403. Decided September 20, 1983.

Respondent was ordered to pay complainant, as reparation, \$9,161.00 plus 13 percent interest per annum from May 1, 1983, until paid.

(No. 23,001)

JOHN LIVACICH PRODUCE, INC. a/t/a RANCHO PACKING Co. v. MAGIC CITY PRODUCE Co., INC. PACA Docket No. RD-83-404. Decided September 20, 1983.

Respondent was ordered to pay complainant, as reparation, \$5,238.50 plus 13 percent interest per annum from March 1, 1983, until paid.

(No. 23,002)

BLOCH & LODER INC. a/t/a PACIFIC PRODUCE COMPANY v. WAIALUA PRODUCTS LTD. PACA Docket No. RD-83-405. Decided September 20, 1983.

Respondent was ordered to pay complainant, as reparation, \$45,968.30 plus 13 percent interest per annum from March 1, 1983, until paid.

(No. 23,003)

CANON POTATO Co., INC. v. GATEWAY PRODUCE Co. PACA Docket No. RD-83-406. Decided September 21, 1983.

Respondent was ordered to pay complainant, as reparation, \$600.0 plus 13 percent interest per annum from November 1, 1982, until paid.

(No. 23,004)

R. H. McCLOSKEY & SON a/k/a VEG-ACRES FARM AND GREENHOUSE v. CLARENCE MILLER Co., INC. PACA Docket No. RD-83-407. Decided September 21, 1983.

Respondent was ordered to pay complainant, as reparation, \$11,447.40 plus 13 percent interest per annum from December 1, 1982, until paid.

(No. 23,005)

ROMAN CREST FRUIT INC. v. VOLARE MARKETING INC. PACA Docket No. RD-83-408. Decided September 21, 1983.

Respondent was ordered to pay complainant, as reparation, \$1,570.40 plus 13 percent interest per annum from February 1, 1983, until paid.

(No. 23,006)

KELLER FARMS v. BIG CHIEF TOMATO AND PRODUCE INC. PACA Docket No. RD-83-409. Decided September 21, 1983.

Respondent was ordered to pay complainant, as reparation, \$4,280.00 plus 13 percent interest per annum from November 1, 1982, until paid.

(No. 23,007)

MELMAN FOOD SALES v. FMA, INC. PACA Docket No. RD-83-410. Decided September 21, 1983.

Respondent was ordered to pay complainant, as reparation, \$49,577.60 plus 13 percent interest per annum from January 1, 1983, until paid.

(No. 23,008)

MEX-I-CAL VEGETABLE Co., INC. v. WESTERN PRODUCE, INC. PACA Docket No. RD-83-411. Decided September 21, 1983.

Respondent was ordered to pay complainant, as reparation, \$1,188.00 plus 13 percent interest per annum from May 1, 1983, until paid.

(No. 23,009)

HIGH AND MIGHTY FARMS, INC. v. PETER A. GUINTA, d/b/a TOP OF THE HILL PRODUCE. PACA Docket No. RD-83-358. Decided September 22, 1983.

Respondent failed to provide a valid reason for failing to file a timely answer to the complaint. Therefore, respondent's request to reopen this matter after default was denied.

Respondent was ordered to pay complainant, as reparation, \$9,940.00 plus 13 percent interest per annum from May 1, 1982, until paid.

(No. 23,010)

WYSOCKI SALES, INC. v. A. G. SHORE COMPANY. PACA Docket No. RD-83-375. Decided October 3, 1983.

Respondent failed to provide any good reason why it did not file a timely answer to the complaint, or why its default should be set aside. Therefore, respondent's petition to reopen this matter after default was denied.

Respondent was ordered to pay complainant, as reparation, \$5,729.50 plus 13 percent interest per annum from December 1, 1982, until paid.

(No. 23,011)

PRODUCE PRODUCTS, INC. v. NOGALES TERMINAL DISTRIBUTORS, INC. PACA Docket No. RD-83-372. Decided October 7, 1983.

Respondent was ordered to pay complainant, as reparation, \$2,731.60 plus 13 percent interest per annum from July 1, 1982, until paid.

(No. 23,012)

WYSOCKI SALES, INC. v. STAPLES FRESH PRODUCE, INC. PACA Docket No. RD-83-412. Decided October 7, 1983.

Respondent was ordered to pay complainant, as reparation, \$2,054.80 plus 13 percent interest per annum from May 1, 1983, until paid.

(No. 23,013)

LUCASA PRODUCE INC. v. PIC-O-PAC INC. PACA Docket No. RD-83-13. Decided October 7, 1983.

Respondent was ordered to pay complainant, as reparation, \$15,909.60 plus 13 percent interest per annum from May 1, 1983, until paid.

(No. 23,014)

DONALD D. SPARLING *v.* CLARENCE MILLER CO., INC. PACA Docket No. RD-83-414. Decided October 7, 1983.

Respondent was ordered to pay complainant, as reparation, \$7,170.29 plus 13 percent interest per annum from October 1, 1982, until paid.

(No. 23,015)

TITUS B. HOOVER d/b/a WILLOW BROOK FARM PRODUCE *v.* MARTHA M. DEFRONZO d/b/a EASTERN PRODUCE CO. PACA Docket No. RD-83-415. Decided October 7, 1983.

Respondent was ordered to pay complainant, as reparation, \$1,957.50 plus 13 percent interest per annum from October 1, 1982, until paid.

(No. 23,016)

STIRLING-UNDERWOOD INC. *v.* A. BENANDI & SON, INC. PACA Docket No. RD-83-416. Decided October 7, 1983.

Respondent was ordered to pay complainant, as reparation, \$3,580.00 plus 13 percent interest per annum from April 1, 1983, until paid.

(No. 23,017)

SIGMA PRODUCE CO. INC. *v.* DAN GARCIA BROKERAGE INC. PACA Docket No. RD-83-417. Decided October 7, 1983.

Respondent was ordered to pay complainant, as reparation, \$23,107.50 plus 13 percent interest per annum from March 1, 1983, until paid.

(No. 23,018)

COAST CITRUS DISTRIBUTORS *v.* RUSSO PRODUCE INC. PACA Docket No. RD-83-418. Decided October 11, 1983.

Respondent was ordered to pay complainant, as reparation, \$5,699.50 plus 13 percent interest per annum from April 1, 1983, until paid.

(No. 23,019)

"3" RIVERS POTATO SERVICE, INC. *v.* RICHMOND PRODUCE CO., INC., and/or RICHMOND PRODUCE COMPANY OF STOCKTON, INC. PACA Docket No. RD-83-419. Decided October 11, 1983.

Cite as 42 A.D. 1707

Respondents were ordered to pay complainant, as reparation, \$43,821.38 plus 13 percent interest per annum from October 1, 1982, until paid.

(No. 23,020)

SCOTT FINKS CO., INC. v. P L W PRODUCE COMPANY INC. PACA
Docket No. RD-83-420. Decided October 11, 1983.

Respondent was ordered to pay complainant, as reparation, \$1,647.50 plus 13 percent interest per annum from March 1, 1983, until paid.

(No. 23,021)

J. S. McMANUS PRODUCE CO., INC. v. P L W PRODUCE COMPANY, INC. PACA Docket No. RD-83-421. Decided October 11, 1983.

Respondent was ordered to pay complainant, as reparation, \$18,609.63 plus 13 percent interest per annum from April 1, 1983, until paid.

(No. 23,022)

SPADA DISTRIBUTING CO., INC. v. P L W PRODUCE COMPANY, INC. PACA Docket No. RD-83-422. Decided October 11, 1983.

Respondent was ordered to pay complainant, as reparation, \$11,796.25 plus 13 percent interest per annum from May 1, 1983, until paid.

(No. 23,023)

WYSOCKI SALES INC. v. P L W PRODUCE COMPANY INC. PACA Docket No. RD-83-423. Decided October 11, 1983.

Respondent was ordered to pay complainant, as reparation, \$13,950.00 plus 13 percent interest per annum from May 1, 1983, until paid.

(No. 23,024)

NOGALES PRODUCE INC. v. PARAGON DISTRIBUTING INC. PACA Docket No. RD-83-424. Decided October 11, 1983.

Respondent was ordered to pay complainant, as reparation, \$20,624.10 plus 13 percent interest per annum from May 1, 1983, until paid.

(No. 23,025)

GRIFFIN & BRAND OF McALLEN, INC. a/t/a INTERNATIONAL FINE FOODS v. DESERT AUTOMATED FARMING INC. a/t/a VINCE FARMS. PACA
Docket No. RD-83-425. Decided October 12, 1983.

Respondent was ordered to pay complainant, as reparation, \$33,250.00 plus 13 percent interest per annum from June 1, 1983, until paid.

(No. 23,026)

BUSHMANS' INC. v. A. BENANDI & SON, INC. PACA Docket No. RD-83-426. Decided October 12, 1983.

Respondent was ordered to pay complainant, as reparation, \$5,853.04 plus 13 percent interest per annum from April 1, 1983, until paid.

(No. 23,027)

FARMERS' MARKETING SERVICE v. A. BENANDI & SON INC. PACA Docket No. RD-83-427. Decided October 12, 1983.

Respondent was ordered to pay complainant, as reparation, \$2,022.50 plus 13 percent interest per annum from February 1, 1988, until paid.

(No. 23,028)

G. CEFALU & BRO., INC. v. GEORGETOWN PRODUCE INC. PACA Docket No. RD-83-428. Decided October 12, 1983.

Respondent was ordered to pay complainant, as reparation, \$13,173.50 plus 13 percent interest per annum from February 1, 1983, until paid.

(No. 23,029)

DON-A-LYNN PRODUCE INC. v. CLARENCE MILLER CO. INC. PACA Docket No. RD-83-429. Decided October 12, 1983.

Respondent was ordered to pay complainant, as reparation, \$11,291.48 plus 13 percent interest per annum from November 1, 1982, until paid.

(No. 23,030)

AL HARRISON COMPANY DISTRIBUTORS v. PARAGON DISTRIBUTING, INC. PACA Docket No. RD-83-430. Decided October 12, 1983.

Respondent was ordered to pay complainant, as reparation, \$52,695.57 plus 13 percent interest per annum from June 1, 1983, until paid.

(No. 23,031)

HARRISON PROD. CO. a/t/a HARRISON & LOGAN PROD. CO. v. GOURMET GALLERY INC. PACA Docket No. RD-83-431. Decided October 12, 1983.

Respondent was ordered to pay complainant, as reparation, \$860.50 plus 13 percent interest per annum from January 1, 1983, until paid.

(No. 23,032)

GOLMAN-HAYDEN Co. INC. v. STAPLES FRESH PRODUCE INC. PACA
Docket No. RD-84-1. Decided October 17, 1983.

Respondent was ordered to pay complainant, as reparation, \$2,923.80 plus 13 percent interest per annum from April 1, 1983, until paid.

(No. 23,033)

WESTSIDE PRODUCE Co. v. TREASURE VALLEY PRODUCE. PACA
Docket No. RD-84-2. Decided October 17, 1983.

Respondent was ordered to pay complainant, as reparation, \$3,024.65 plus 13 percent interest per annum from May 1, 1983, until paid.

(No. 23,034)

E. A. BROWN TOMATOES INC. v. FRANK GALIPP PRODUCE Co., INC.
PACA Docket No. RD-84-4. Decided October 17, 1983.

Respondent was ordered to pay complainant, as reparation, \$3,034.00 plus 13 percent interest per annum from November 1, 1982, until paid.

(No. 23,035)

CALIFORNIA BRINERS v. PIC-O-PAC INC. PACA
Docket No. RD-84-5. Decided October 17, 1983.

Respondent was ordered to pay complainant, as reparation, \$6,085.40 plus 13 percent interest per annum from June 1, 1983, until paid.

(No. 23,036)

PETER ABRAMOWSKI SONS INC. v. COAST TO COAST PRODUCE INC.
PACA Docket No. RD-84-6. Decided October 18, 1983.

Respondent was ordered to pay complainant, as reparation, \$11,419.00 plus 13 percent interest per annum from December 1, 1982, until paid.

(No. 23,037)

H. C. MacCLAREN, INC. v. QUALITY COOP, INC. PACA
Docket No. RD-84-7. Decided October 18, 1983.

Respondent was ordered to pay complainant, as reparation, \$3,261.55 plus 13 percent interest per annum from February 1, 1983, until paid.

(No. 23,038)

MERRILL FARMS v. FAVA & COMPANY INC. PACA Docket No. RD-84-8. Decided October 18, 1983.

Respondent was ordered to pay complainant, as reparation, \$1,729.00 plus 13 percent interest per annum from July 1, 1983, until paid.

(No. 23,039)

PACIFIC COAST FRUIT Co. v. GEORGE J. HUTCHISON AND FRANCES L. TOLMAN d/b/a TREASURE VALLEY PRODUCE. PACA Docket No. RD-84-9. Decided October 18, 1983.

Respondent was ordered to pay complainant, as reparation, \$19,385.01 plus 13 percent interest per annum from April 1, 1983, until paid.

(No. 23,040)

NOGALES PRODUCE INC. v. MIRAMAR FARM SALES. PACA Docket No. RD-84-10. Decided October 18, 1983.

Respondent was ordered to pay complainant, as reparation, \$9,815.10 plus 13 percent interest per annum from April 1, 1983, until paid.

MISCELLANEOUS REPARATION DEFAULT ORDERS ISSUED BY
DONALD A. CAMPBELL, JUDICIAL OFFICER

(No. 23,041)

GWIN, WHITE & PRINCE INC. v. MAGGIE-PAUL, INC. PACA Docket No. RD-83-360. Order issued September 1, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on August 16, 1983, awarding reparation to the complainant in the amount of \$111,070.75. By letter received August 12, 1983, respondent has moved that this matter be stayed due to respondent having filed a petition in bankruptcy pursuant to Chapter 7 of the Bankruptcy Act (11 U.S.C. 701 *et seq.*) on July 13, 1983.

Accordingly, the order of August 16, 1983, is hereby stayed. Re-

spondent has fifteen (15) days from its receipt of this order to file a copy of the petition or a letter from the Bankruptcy Court confirming that the petition was filed. Respondent's failure to provide this information within the 15 day period will result in the reinstatement of the Default Order.

Copies of this order shall be served upon the parties.

(No. 23,042)

GILBAR POTATO SALES, INC. v. COMMODITY MARKETING COMPANY.
PACA Docket No. RD-88-323. Order issued September 7, 1983.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25 (e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Tendelson-Zeller Co. v. United Fruit Distributors*, 16 Agric. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

[New Docket Number is PACA 2-6390.—Ed.]

(No. 23,043)

L&V PRODUCE v. RICCELLI PRODUCE. PACA Docket No. RD-88-319. Order issued September 9, 1983.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)).

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

[New docket number is PACA 2-6391.—Ed.]

(No. 23,044)

ROBINSON & SWALES ENTERPRISES INC. v. LOUIS H. ASTRIN d/b/a J & L TOMATOES. PACA Docket No. RD-83-348. Order issued September 9, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on August 12, 1983, awarding reparation to the complainant in the amount of \$11,368. By letter received August 11, 1983, respondent has moved that this matter be reopened after default.

Accordingly, the order of August 12, 1983 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant along with this order.

(No. 23,045)

AGRI-PAK FRUIT Co. v. A. LEVANTINO PRODUCE CORP. PACA Docket No. RD-83-349. Order issued September 13, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on August 12, 1983, awarding reparation to the complainant in the amount of \$7,338.60. Pursuant to a telephone call on August 18, 1983 respondent has moved that this matter be stayed and it be permitted a period of time to prepare a motion to reopen.

Accordingly, the order of August 12, 1983, is hereby stayed. Re-

spondent may have ten (10) days from receipt of this order to file its motion to reopen after default. A copy of the June 20, 1983, return receipt card apparently evidencing service of the complaint will be sent to respondent with a copy of this order.

Copies of this order shall be served upon the parties.

(No. 23,046)

SUN VALLEY DISTRIBUTORS, INC. v. YGNACIO D. LOPEZ, d/b/a CAT LOPEZ, JR. PACA Docket No. RD-83-234. Order issued September 15, 1983.

ORDER VACATING STAY AND REINSTATING DEFAULT ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), in which a Default Order was issued on June 10, 1983, requiring the respondent to pay complainant \$9,606.37, with interest from September 1, 1982. The June 10, 1983, Default Order was stayed on July 18, 1983, to allow the Department time to consider respondent's June 6, 1983, request to reopen after default. The request was served on complainant which filed opposition thereto.

Respondent's request for reopening has been considered. Its request is based upon a "lack of communication." However, respondent has failed to provide any more details than that. In points of fact, respondent did not even indicate who the parties were to this "lack of communication." Respondent has thus failed to show good reason why he failed to file a timely answer. Consequently, respondent's request to reopen after default must be denied.

Since we have denied respondent's request to reopen after default, the July 18, 1983, stay order is vacated and the June 10, 1983, Default Order is reinstated except that payment shall be made within thirty (30) days from the date of this order.

(No. 23,047)

MORRIS OKUN INC. v. STANLEY & JOE RUSSO. PACA Docket No. RD-83-394. Order issued September 22, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on September 13, 1983, awarding reparation to the com-

plainant in the amount of \$3,594. By letter received September 7, 1983, respondent has moved that this matter be reopened after default.

Accordingly, the order of September 13, 1983, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

(No. 23,048)

WILLIAM Y. MURPHEY d/b/a NATIVE AMERICAN FARMS v. AMERICAN PRODUCE Co. PACA Docket No. RD-83-399. Order issued September 22, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on September 13, 1983, awarding reparation to the complainant in the amount of \$26,863.90. By letter received September 7, 1983, respondent has moved that this matter be reopened after default.

Accordingly, the order of September 13, 1983, is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen after default.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant along with this order.

(No. 23,049)

EXETER PACKERS, INC. v. PRIME-PAC, INC. a/t/a J & S POTATO COMPANY, and/or NETWORK BROKERAGE, INC. PACA Docket No. RD-83-386. Order issued October 6, 1983.

STAY ORDER

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on September 1, 1983, awarding reparation to the complainant in the amount of \$14,832.45. By letter received September 2, 1983, respondent, Prime-Pac, Inc., a/t/a J & S Potato Company had moved that this matter be reopened.

Accordingly, the order of September 1, 1983 is hereby stayed. Com-

plaintant may have fifteen (15) days from receipt of this order to file an answer to the petition to reopen.

Copies of this order shall be served upon the parties. A copy of respondent's petition shall be served upon the complainant.

(No. 23,050)

R. H. McCLOSKEY & SON, a/k/a VEG-ACRES FARM AND GREENHOUSES v. CLARENCE MILLER Co., INC. PACA Docket No. RD-83-407. Order issued October 6, 1983.

STAY ORDER AND NOTICE TO SHOW CAUSE

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*), a Default Order was issued on September 21, 1983, awarding reparation to the complainant in the amount of \$11,447.43. By letter received September 20, 1983, respondent has claimed that it has already paid complainant in full for the 23 lots of mixed vegetables involved herein.

Accordingly, the order of September 21, 1983 is hereby stayed. Complainant may have fifteen (15) days from receipt of this order to show cause why the Default Order of September 21, 1983, should not be vacated, and its complaint not be dismissed on account of its receipt of payment in full from respondent prior to issuance of that order. A failure to respond will result in the conclusion that respondent's allegations that it has already paid complainant in full is correct.

Copies of this order shall be served upon the parties. A copy of respondent's September 16, 1983, letter shall be served upon the complainant.

(No. 23,051)

TROPIC KING GROVES a/t/a SILVER PALM GROVES v. ANTHONY GAGLIANO & Co., INC. PACA Docket No. RD-83-361. Order issued October 26, 1983.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of \$693.00 in connection with a transaction involving the shipment of avocados in interstate commerce.

A copy of the formal complaint was served on respondent which did not file a timely answer. However, prior to the issuance of a default order, complainant notified the Department that respondent tendered to complainant a check in full settlement of complainant's claim, and authorized dismissal of its complaint filed herein.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

(No. 23,052)

DAVID W. BROCK and DONALD E. BROCK d/b/a SIGNAL PRODUCE COMPANY v. SAMUEL R. DAINES INTERNATIONAL, INC. PACA Docket No. RD-83-389. Order issued October 26, 1983.

DENIAL OF PETITION TO REOPEN

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), a Default Order was issued on September 13, 1983, requiring respondent to pay complainant \$3,965.94 with interest thereon at the rate of 13% per annum from April 1, 1983, until paid. The Default Order was served on respondent on September 16, 1983, and on October 13, 1983, the respondent submitted a petition to reopen after default. The petition was mailed on October 12, 1983. Petitions for reopening after default must be filed "within a reasonable time after the time for filing an answer has expired * * *." In the instant case, the answer was due not later than August 1, 1983, or 2½ months before the petition to reopen was filed. The petition to reopen was thus not filed within a reasonable time after the answer was due. Since the Default Order was served on respondent on September 16, 1983, a month before the petition was filed, it was not even filed within a reasonable time after service of the Default Order. Consequently the petition is denied. *Santo Tomas Produce Association v. Ozuna Produce*, 39 Agric. Dec. 795 (1980).

(No. 23,053)

ROBINSON & SWALES ENTERPRISES INC. v. LOUIS H. ASTRIN d/b/a J & L TOMATOES. PACA Docket No. RD-83-348. Order issued October 28, 1983.

ORDER REOPENING AFTER DEFAULT

According to the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*), the respondent failed to file a

timely answer. However, subsequent to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). A stay order was issued on September 9, 1983.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 A.D. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties.

[New docket number is PACA 2-6417.-Ed.]

(No. 28,054)

WILLIAM Y. MURPHEY, d/b/a NATIVE AMERICAN FARMS v. AMERICAN PRODUCE Co. PACA Docket No. RD-83-399. Order issued October 28, 1983.

ORDER REOPENING AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent filed a motion to reopen the proceeding after default and allow the filing of an answer pursuant to section 47.25 of the Rules of Practice (7 CFR 47.25(e)). Respondent's motion was served on complainant which filed a response opposing the granting of respondent's motion.

The record has been carefully considered and it is concluded that the motion to reopen was filed within a reasonable time, and that good reason has been shown why the relief requested in the motion should be granted. *Mendelson-Zeller Co. v. United Fruit Distributors*, 16 Agric. Dec. 790 (1957). Accordingly, respondent's default in the filing of an answer is set aside and the proposed answer submitted by respondent is hereby ordered filed.

Copies of this order shall be served upon the parties. A copy of respondent's answer shall be served upon complainant.

[New docket number is PACA 2-6416.-Ed.]

DISCIPLINARY DECISION

(No. 23,055)

In re: ELBERTON POULTRY COMPANY, INC. PPIA Docket No. 9. Decided September 21, 1983.

Withdrawal and denial of inspection service-- Consent.

Andrea Bateman, for complainant

L. Clifford Adams, Jr., Atlanta, Georgia for respondent.

Decision by William J. Weber, Administrative Law Judge.

STIPULATION AND CONSENT DECISION

This is a proceeding under the Poultry Products Inspection Act, as amended (21 U.S.C. 451 *et seq.*), and the applicable Rules of Practice (9 CFR 381.230 *et seq.*), to withdraw poultry products inspection service from respondent Elberton Poultry Company, Inc. (hereinafter referred as to respondent Elberton). The proceeding was commenced by a complaint issued on April 18, 1983, by the Food Safety and Inspection Service (FSIS), United States Department of Agriculture, which is responsible for the administration of the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*). The parties have agreed that this proceeding should be terminated by entry of the Consent Decision set forth below and have agreed to the following Stipulation:

1. For purposes of this Stipulation and the provisions of this Consent Decision only, respondent Elberton admits the Findings of Fact set forth herein, admits all of the jurisdictional allegations of the complaint, and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in this proceeding contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases therein; and

(c) All rights to seek judicial review or otherwise to challenge, or contest the validity of this decision.

2. The respondent Elberton, stipulates that the United States Department of Agriculture is the "prevailing party" in this proceeding and waives any action against the United States Department of Agriculture, under the Equal Access to Justice Act of 1980, Pub. L. 96-481, which went into effect October 1, 1981, for fee and other expenses incurred by respondent in connection with this proceeding.

3. The Stipulation and Consent Decision are for settlement purposes in this proceeding only and do not constitute an admission or denial by respondent Elberton that it has violated the regulations or statute involved.

FINDINGS OF FACT

1. Respondent Elberton d/b/a Elberton Poultry Company, Elberton Foods Company and Elberton Exports, Inc., is a corporation which operates a poultry slaughter and processing establishment at Old Middleton Road, Elberton, Georgia 30635, and is now, and at all times material herein was, the recipient of inspection service under the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*).

2. Respondent Elberton on or about December 9, 1982, was convicted in the United States District Court for the Middle District of Georgia, of a felony for the transportation of contaminated poultry in interstate commerce in violation of Title 21, United States Code, Sections 453(g)(3), 158(a)(2)(A) and 461(a).

CONCLUSIONS

Inasmuch as the parties have agreed to the provisions set forth in the following Consent Decision as the following disposition of this proceeding, such Decision will be issued.

ORDER

1. The inspection service under the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) is hereby actually withdrawn from and denied to respondent Elberton, its officers, directors, successors, affiliates and assigns, directly or through any corporate or other device for a period of fourteen calendar days to being on December 24, 1983. Elberton Poultry Company, Inc.'s right to inspection under the Poultry Products Inspection Act is reinstated on January 9, 1984, subject to an acceptable pre-operational sanitation review, which review will take place prior to the expiration of actual withdrawal.

2. The inspection service under Title I of the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) is withdrawn from and denied to respondent Elberton its officers, directors, successors, affiliates and assigns, directly or through any corporate or other device, for one year:

(a) *Provided however:* That such withdrawal and denial of inspection service shall be suspended unless, within a year of the effective date of the Consent Decision, respondent Elberton, or any of its officers, employees, or agents violate (as that term is defined in paragraph II(c) *infra*) any section of the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), involving the preparation, handling, acquiring, sale, transportation, or attempted distribution of any adulterated or misbranded products.

(b) *And provided further:* that respondent Elberton, for one year from the effective date of this Consent Decision shall:

(1) not knowingly hire, in any capacity, any individual who has been convicted of any section of the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) or any other federal or state statute involving the preparation, sale, transporatation, or attempted distribution of any adulterated or misbranded products;

(2) immediately dismiss from its employment any such individual hired after the effective date of this decision when that individual's conviction becomes known.

(c) *And provided further:* That the terms violate and "violation", as used herein, mean a violation found upon conviction (or upon affirmation of conviction, if appealed), or upon final decision in a formal adjudicatory proceeding before the Secretary (or upon affirmation of the Secretary's decision, if appealed), and that if it is found that there is any such violation of any term of this Consent Decision the suspension of the withdrawal and denial of inspection service under the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*) shall be terminated and such withdrawal and denial will become effective immediately.

(d) *And provided further:* That this Consent Decision will become effective on September 21, 1983.

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